ORIGINAL

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable YVONNE GONZALEZ ROGERS, Judge

IN RE: SOCIAL MEDIA ADOLESCENT ADDICTION/ PERSONAL INJURY PRODUCTS LIABILITY LITIGATION	)	**Further Case Management/ Motions**
	)	NO. C 22-03047 YGR
ALL ACTIONS	)	Pages 1 - 130
	)	Oakland, California Friday, May 17, 2024

REPORTER'S TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

For Plaintiffs:

Lieff, Cabraser, Heimann & Bernstein
275 Battery Street, 30th Floor
San Francisco, California 94111
BY: LEXI J. HAZAM,
MICHAEL LEVIN-GESUNDHEIT,
PATRICK I. ANDREWS, ATTORNEYS AT LAW

Seeger Weiss LLP
55 Challenger Road, Sixth Floor
Ridgefield Park, New Jersey 07660
BY: CHRISTOPHER A. SEEGER,
AUDREY SIEGEL, ATTORNEYS AT LAW

(Appearances continued next page)

Reported By: Raynee H. Mercado, CSR No. 8258

Proceedings reported by electronic/mechanical stenography; transcript produced by computer-aided transcription.

A P P E A R A N C E S (CONT'D.)

For Plaintiffs:

Motley Rice LLC
401 9th Street NW Suite 630
Washington, DC 20004
BY: PREVIN WARREN, ATTORNEY AT LAW

Motley Rice LLC
28 Bridgeside Boulevard
Mt. Pleasant, South Carolina 29464
BY: JADE A. HAILESELASSIE, ATTORNEY AT LAW

Andrus Anderson LLP
155 Montgomery Street, Suite 900
San Francisco, California 94104
BY: JENNIE LEE ANDERSON, ATTORNEY AT LAW

Beasley Allen Crow Methvin Portis & Miles, P.C.
218 Commerce Street
Montgomery, Alabama 36103
BY: CLINT RICHARDSON,
DAVIS S. VAUGHN, ATTORNEY AT LAW

Social Media Victims Law Center
821 Second Avenue, Suite 2100
Seattle, Washington 98104
BY: GLENN DRAPER, ATTORNEY AT LAW

Gibbs Law Group
1111 Broadway, Suite 2100
Oakland, California 94607
BY: ANDRE MURA, ATTORNEY AT LAW

Kessler Topaz Meltzer Check LLP
280 King of Prussia Road
Radnor, Pennsylvania 19087
BY: TYLER S. GRADEN,
MELISSA L. YEATES, ATTORNEY AT LAW

Levin Sedran and Berman LLP
510 Walnut Street, Suite 500
Philadelphia, Pennsylvania 19106
BY: MICHAEL M. WEINKOWITZ, ATTORNEY AT LAW

A P P E A R A N C E S (CONT'D.)

For Plaintiffs:
Carella Byrne Cecchi Brody & Agnello, P.C.
5 Becker Farm Road
Roseland, New Jersey 07068
BY: MICHAEL INNES, ATTORNEY AT LAW

For Plaintiff State of California:
California Department of Justice
1515 Clay Street, 20th Floor
Oakland, California 94612-0550
BY: JOSHUA E. OLSZEWSKI-JUBELIRER, DEPUTY ATTORNEY GENERAL

For Plaintiff Colorado:
Colorado Department of Law
1300 Broadway, 6th Floor
Denver, Colorado 80203
BY: BIANCA MIYATA, SENIOR ASSISTANT ATTORNEY GENERAL
ELIZABETH OREM, ASSISTANT ATTORNEY GENERAL

For Plaintiff Commonwealth of Kentucky:
Office of the Kentucky Attorney General
Consumer & Senior Protection
1024 Capital Center Drive, Suite 2000
Frankfort, Kentucky 40601
BY: CHRISTIAN LEWIS, COMMISIONER
DANIEL KEISER, Assistant Attorney General

A P P E A R A N C E S (CONT'D.)

For the Meta Defendants:

Covington & Burling LLP
One City Center
850 Tenth Street, NW
Washington, DC 20001-4956
BY: MICHAEL X. IMBROSCIO,
CHRISTIAN J. PISTILLI,
ATTORNEYS AT LAW

Covington & Burling LLP
1999 Avenue of the Stars, Suite 3500
Los Angeles, California 90067
BY: ASHLEY SIMONSEN, ATTORNEY AT LAW

Covington & Burling LLP
Sales Force Tower
415 Mission Street, Suite 5400
San Francisco, California 94111-5356
BY: ISAAC D. CHAPUT, ATTORNEY AT LAW

For Defendant Snap Inc.:

Munger, Tolles & Olson
560 Mission Street, 27th Floor
San Francisco, California 94105
BY: JONATHAN H. BLAVIN, ATTORNEY AT LAW

For Defendant TikTok Inc.; ByteDance, Inc.:

King & Spalding LLP
1180 Peachtree Street, N.E.
Suite 1600
Atlanta, Georgia 30309-3521
BY: GEOFFREY M. DRAKE, ATTORNEY AT LAW

King & Spalding LLP
1700 Pennsylvania Avenue NW
Suite 900
Washington, D.C. 20006
BY: DAVID P. MATTERN, ATTORNEY AT LAW

Faegre Drinker Biddle & Reath LLP
300 North Meridian Street, Suite 2500
Indianapolis, Indiana 46204
BY: ANDREA PIERSON, ATTORNEY AT LAW

A P P E A R A N C E S (CONT'D.)

For Defendant YouTube Inc.:

Wilson Sonsini Goodrich & Rosati
633 West Fifth Street, Suite 1550
Los Angeles, California 90071
BY: MATTHEW K. DONOHUE, ATTORNEY AT LAW

Morgan Lewis Bockius
300 S. Grand Avenue, 22nd Floor
Los Angeles, California 90071
BY: YARDENA R. ZWANG-WEISSMAN,
ATTORNEY AT LAW

Williams & Connolly LLP
725 Twelfth Street NW
Washington, DC 20005
BY: ASHLEY W. HARDIN, ATTORNEY AT LAW

--OOO--

Friday, May 17, 2024 7:59 a.m.

P R O C E E D I N G S

--o0o--

THE CLERK: Good morning, everyone. These proceedings are being court-reported by this court. Any other recording of this proceeding either by video, audio, including screenshots or other copying of the hearing is strictly prohibited.

Your Honor, now calling the civil matter 22-MD-3047-YGR, In Re Social Media Adolescent Addiction Personal Injury Products Liability Litigation.

Appearances for today's hearing will be added onto the minutes and transcript.

Good morning.

THE COURT: All right. Thank you. Good morning.

Okay. Let's get our plan together for today. If I could have one from each side on the mic, and we'll go through. There are a number of just case management issues that we need to deal with in addition to the argument.

So with respect to case management, who will be dealing with those topics?

MR. WARREN: Previn Warren for the personal injury school district plaintiffs.

MS. SIMONSEN: Your Honor, a number of us from the

defense side, but I can begin.

Ashley Simonsen, Covington & Burling, for the Meta defendants.

THE COURT: Okay. And then with respect to the argument, have you all met and conferred on the outline of topics? Or if not we can just go -- I can go through and identify them. Or is there just going to be one arguing?

MR. WEINKOWITZ: Good morning, Your Honor.

(Discussion off the record.)

MR. WEINKOWITZ: Yes, I'm sorry.

Mike Weinkowitz on behalf of the school district plaintiffs.

We made a proposal to the defendants, but the defendants thought we would just defer to how you would want to proceed, which is fine with us.

My proposal would be -- the plaintiffs' proposal we do nuisance first, negligence second. We can do derivative injury and proximate cause after that.

And then if you need to hear on First Amendment and 230, which we --

THE COURT: Well, we decided we were not --

MR. WEINKOWITZ: Right.

THE COURT: -- doing that --

MR. WEINKOWITZ: Correct.

THE COURT: -- so we're not doing that.

MR. WEINKOWITZ: Great.

MS. HARDIN: Ashley Hardin for the defendants, Your Honor.

That order is acceptable to the defense.

And I'm happy to tell you who's going to cover what if you'd like to hear that, or we can save that for when the time comes.

THE COURT: Okay. Well, I'm going to flip them. So I'd like to discuss the threshold issues first, so derivative injury rule and then proximate cause.

Who will be doing those?

MR. WEINKOWITZ: Those will be handled for the plaintiff by Andre Mura, M-U-R-A.

THE COURT: And for the defense?

MS. HARDIN: That will be Christian Pistilli from Covington & Burling, who represents the Meta defendants.

THE COURT: Okay. And they'll be doing both?

MS. HARDIN: Both.

THE COURT: Okay. And then moving to public nuisance?

MR. WEINKOWITZ: For the plaintiffs, I'll be covering that.

MS. HARDIN: I'll be covering that, Your Honor, Ashley Hardin from Williams & Connolly on behalf of the YouTube defendants.

THE COURT: Okay. And then negligence.

MR. WEINKOWITZ: Melissa Yeates will be handling negligence for the plaintiffs, Y-E-A-T-E-S.

MS. HARDIN: That's David Mattern from King & Spalding, who represents the TikTok defendants.

THE COURT: All right. Anything I missed?

MR. WEINKOWITZ: No, that's it. Thanks. That's it, Your Honor.

MS. HARDIN: That's it, Your Honor.

THE COURT: Okay. All right. Let's go ahead and deal with the case management issues first.

Let's start with the plaintiffs' administrative motion with respect to the bellwether user data and account information. This is at Docket 843.

MR. CHAPUT: Good morning, Your Honor. Isaac Chaput, Covington & Burling, for the Meta defendants.

MR. WARREN: And Previn Warren for the personal injury school district plaintiffs.

THE COURT: Okay. So there are problems with plaintiffs meeting my deadlines and there -- it appears to be concerns about getting data sooner from the defense. Right?

MR. WARREN: Yes, Your Honor. I think both of those are fair.

THE COURT: Okay.

So first let me ask you, why should I be granting

plaintiffs' relief when you're not meeting my deadlines? Especially, and I should say, because you asked for those deadlines.

MR. WARREN: Yes, Your Honor.

Well, we are certainly not hitting a perfect score on the plaintiff fact sheet. There's no dispute about that. I will say that, you know, subsequent to Your Honor's order, we have had 23 of the missing 45 fact sheets filed by the deadline. Two were filed late. And one will be filed today.

So that leaves 21 out of the 233 plaintiffs' fact sheets that are -- are missing. Of those, five of those cases are set to be dismissed so they will exit the pool entirely. I think those are pending agreement from defendants to dismiss those cases. Some of the dismissals, I think, have been filed. Others not yet but will be.

THE COURT: Hold on. Hold on.

(Off-the-record discussion.)

THE COURT: Thank you. Go ahead.

MR. WARREN: So that -- that takes us from 21 down to, I believe, that's 16 missing plaintiffs' fact sheets. And in those situations, you know, we do have the attorneys --

(Off-the-record discussion.)

THE COURT: All right. So of the 16 --

MR. WARREN: Of the 16, there are three cases where the attorneys have moved to withdraw for just inability to

contact the clients. So really efforts -- all efforts have been made to, you know, handle those cases, and the attorneys just, you know, in the absence of being able to do anything else, they're moving to withdraw.

THE COURT: Right.

MR. WARREN: So that leaves 13. The -- the lawyers for those 13 cases are able to address those. They're here today. It's two -- two firms.

And my understanding is that eight of those, the clients are also nonresponsive. The attorneys have not yet moved to withdraw. I think that may be -- may be something that comes, but they have not determined to reach that point.

And then there's five left. Those are Mr. Draper. Glenn Draper of the Social Media Victims Law Center is here if you would like to speak with him about those five cases. And I think he has approached defendants about extenuating circumstances and asked for an extension of time given the very specific factual situations of those clients.

So I guess what I would like to convey is we -- you know, I know Your Honor has had concerns about gamesmanship at various points in this process. We really, really are not trying to play games here. The attorneys -- well, leadership has conveyed the, you know, importance of these deadlines to the attorneys. The attorneys have conveyed that to the clients. Either the clients have been unreachable, or every

effort has been made to get the PFS in, you know, either on time or, in a couple cases, a little late.

So that's the work we've been doing. We've been really trying our hardest, and our success rate at this point hovers above 90 percent. So an A minus is certainly not a perfect score, but we're trying what we can do.

On the other side of it, you know, for the defendants' fact sheets, it's not that we're asking for an accelerated deadline of that discovery. We're just asking for the discovery to be produced in line with the JCCP. So what the defendants are already doing and already able to do, we would just ask that that basic information be produced to us.

We see that as the flip of the plaintiffs' fact sheets, right? So right now, defendants have 90 percent of the plaintiff fact sheets. We have zero percent of the defendants' fact sheets. And we'd like to bring that up closer to parity.

And of course there are also going to be discovery requests, and those will be handled through Magistrate Judge Kang in the due course. But for this limited set of kind of threshold information, which is the snapshots and the defendants' fact sheets, we would just ask that those be produced on a kind of commensurate schedule to the state court proceeding.

THE COURT: Okay. Remind me of your name again?

MR. CHAPUT: Isaac Chaput, Covington & Burling, Your Honor.

THE COURT: Okay. Mr. Chaput, why is it that in the state you can produce this information in two days, and here you all convinced me that you needed 45?

MR. CHAPUT: So there are a number of nuances in -- in that area, Your Honor.

First, defendants' opposition will be filed on -- on Monday as -- as it is due under the rule --

THE COURT: So that may be, but we're here today. And so I don't know why you would want to do that in any event if I'm asking you the question.

I have a not insignificant amount of cases on my docket at the moment. I'll spend all morning with you, and then I'll roll right into the continuing evidentiary hearing in Epic Games vs. Apple. So you want me to read some more on Monday, when I have about 30 lawyers in the audience and I can deal with things right now? It's not like you can appeal the order.

MR. CHAPUT: I'm happy to address the substance now, Your Honor.

The -- the 45 days that we have under the process to obtain confirmation -- confirmation and consent forms from the plaintiffs and then produce the account captures is necessary because of the volume of account captures that we're dealing

with in that --

THE COURT: What do you mean by volume? If I order this with respect to the bellwethers, what's the issue?

MR. CHAPUT: So, Your Honor, I was trying to address Your Honor's question about the difference between the two days and the 45 days, and that's the reason that the 45 days is necessary in that particular circumstance.

With respect to the two-day timeline that Judge Kuhl ordered in the JCCP, we have expressed to Judge Kuhl that we are concerned that we likely will not be able to meet that deadline. And she's told us that we should nonetheless try and meet and confer with plaintiffs if we need to.

Currently, the -- the major issue that is -- means we need a little bit more time to get the account captures produced to plaintiffs is simply the volume of other account captures each of the defendants is already working through in order to comply with that 45-day timeline to provide account captures where individual plaintiffs are unable to access their accounts.

There's a significant volume of accounts that are subject to that procedure, both in this proceeding and in the JCCP. And we're under all existing deadlines to -- to roll those captures out in a -- in a quick basis.

And so, you know, in -- if we were to kind of set that process to the side and -- in order to meet this new deadline

that plaintiffs are asking for here, that -- that would require us to potentially not be able to make those other deadlines.

Additionally, I understand that certain of the defendants have additional timing concerns that other counsel can address. But really, Your Honor, I think the -- the core of this is the plaintiffs -- the bellwether plaintiffs were selected back on April 19th. And plaintiffs waited weeks before even asking for us to produce these captures. And that significant delay on plaintiffs' side suggests that the --

THE COURT: When were they -- when did they ask you?

MR. CHAPUT: They first requested the account captures on May 2nd. But they didn't serve a request for production seeking those account captures until a week ago. And even today, one of the bellwether plaintiffs hasn't yet served any requests for production for those account captures.

THE COURT: When you said that they asked on May 2nd, what does that mean?

MR. CHAPUT: They sent us an email asking us to produce the account captures, but they didn't serve requests for production seeking those account captures.

THE COURT: So you do nothing between the informal request and the formal request?

MR. CHAPUT: That's not accurate, Your Honor. We -- we met and conferred with them, and we expressed that in

defendants' view in order to produce this discovery, we need a formal request for production. We need to follow the federal rules so that everything is buttoned up, we have the actual request, and we are being responsive to a request for production under Rule 34.

MR. WARREN: Your Honor, may I briefly respond?

THE COURT: You may.

MR. WARREN: We would not be asking for perfection out of the defendants in this process given that we ourselves have not been able to meet that standard. What we are asking for is for the defendants to work in good faith to produce the DFS and the snapshots in as timely a manner as they can, as consistent with the JCCP as possible.

That request was rebuffed. And we were told to route everything through Rule 34 requests, which is -- would be treating the DFS data and the user snapshots different in kind than the PFS.

And we think that lack of parity is -- is not -- is not equitable. And we think that we need -- all parties would benefit from some early, you know, immediate productions of this basic information just as they're doing in the JCCP.

But, again, we're -- we're not out to play gotcha with the defendants and say, oh, you produced it on day three, not day two, you know, we're going to go to the court. We would work with them, but we do just want to ensure that they are going

to respect the DFS process that was negotiated in the JCCP with an understanding that it would be important to the MDL as the PFS process was.

MR. CHAPUT: Your Honor, if I may address the DFS process because that's a bit distinct from the account capture issue I was addressing previously.

With respect to the DFS-type data, defendants do expect that we're going to produce that data at a reasonable time after bellwether selection is complete.

THE COURT: What does that mean?

MR. CHAPUT: That means that it's going to vary for each defendant, Your Honor. And the reason for that is there are some significant burdens associated in getting that data production out. And plaintiffs are aware of those burdens from their participation in the JCCP DFS discussions.

So for the May 31st production of DFS data that's going to be made in the JCCP, defendants had to finalize their lists of the accounts that would be produced on that date at the beginning of May.

The plaintiffs here didn't reach out to us asking to have --

THE COURT: How many were on that list?

MR. CHAPUT: For Meta, there are a few -- a few hundred accounts, if I recall.

And the burden, Your Honor, isn't the volume of accounts.

It's the amount of time that's required to get the data out of the systems and to quality check the production.

The request from plaintiffs to produce the DFS-type data in this proceeding for Meta came after we had already finalized that list. And so it was simply too late for us to include those particular accounts in the production that we're already running and that's going to be made on May 31st.

That month-long production process for Meta followed an even longer process of restoring historical data so that data would actually be accessible to be queried for the production.

And so as a result of the process that the parties negotiated and agreed to in the JCCP, Meta is only able to produce complete DFS data in the JCCP for accounts that we had identified as of February 27th of this year. And that limitation is reflected in the DFS that's attached to plaintiffs' motion at ECF 843-2. That limitation is missing, however, from the plaintiffs' proposed order at ECF 843-4.

And the limitation really matters because one of the bellwether personal injury plaintiffs filed her case on April 1st. And so her accounts therefore could not have been identified as of February 27th. And Meta hasn't yet had time to restore all of the historical data for each of her accounts and -- and query it.

Additionally, because we haven't yet finished bellwether selection in either this proceeding or the JCCP, we don't know

the full universe of accounts that we're going to need to produce the DFS data for. Because of the amount of time that it takes both for this data restore process and the month-long production process itself, we would submit that we should make this production of DFS data a single time for all of the bellwether plaintiffs because otherwise we're going to be incurring unnecessary burden of pulling -- running these productions multiple times.

And as I said, the burden doesn't come from the number of accounts that you're pulling, but just the time that it takes to move the volume of data we're talking about from one place to another.

THE COURT: I don't understand that. I don't understand how it is that there isn't a burden -- we have how many plaintiffs, 233?

MR. WARREN: Yes, Your Honor.

THE COURT: I don't understand how -- how there is less burden to pull data for ten people versus 233. That's the argument you're making?

MR. CHAPUT: No. That's not the argument I'm making, Your Honor. The argument I'm making --

THE COURT: You just said that the volume doesn't matter.

MR. CHAPUT: Correct, because we are -- we are querying the same set of data and the -- the number of account

identifiers that you are asking to call out of that data set doesn't have a meaningful impact on how long it takes to run the production. Because -- just because of the --

THE COURT: And it doesn't -- so you said you're doing quality control. There is no difference between doing quality control between 10 or 15 and 233?

MR. CHAPUT: The -- the checks are essentially the same in terms of making sure that the process is operated correctly and that there weren't errors in the process.

And that -- that process of making sure that there were no errors takes substantially the same amount of time.

As Your Honor can -- can appreciate based on the -- the colloquy we're having, this is a very complex dispute. We spent hours negotiating both with plaintiffs with Judge Kuhl in the context of the JCCP DFS.

THE COURT: Yeah, but at the JCCP, she's telling you to do it in two days.

MR. CHAPUT: So, Your Honor, if I may. The DFS data is not being produced in two days. The two-day deadline is only for the account captures which is a completely separate process from pulling the DFS data.

THE COURT: And for the account captures, when are you producing them here?

MR. CHAPUT: So it -- it varies between defendants. Certain defendants anticipate that we could provide them

within the next couple of weeks. Other defendants will need a bit longer due to the --

THE COURT: That's too ambiguous for me. So how long is it going to take Meta?

MR. CHAPUT: June 10th at the latest.

THE COURT: Snap.

MR. BLAVIN: Your Honor, Jonathan Blavin from Munger Tolles.

I think we can get the data produced, the account preservation snapshots, in approximately a month.

THE COURT: Give me a date.

MR. BLAVIN: Four weeks from today.

And, Your Honor, I would just note that Snap is a significantly smaller company than some of the other codefendants. And its resources are already extremely strained at this moment in trying to meet the existing workflow deadlines, but we've told plaintiffs' counsel that we could get them the data in four weeks for the preservation snapshots.

THE COURT: So June 14th.

TikTok?

MS. PIERSON: Your Honor, we can be prepared by June 14th.

CERTIFIED STENOGRAPHIC REPORTER: Please state your appearance for the record.

MS. PIERSON: Apologies.

Andrea Pierson, Faegre Drinker, for the TikTok defendants.

Your Honor, the TikTok defendants can also be prepared to produce those things by June the 14th. We could probably do it by June the 10th which is the date on which our responses to request for production are currently due if -- if that's helpful to plaintiffs in some way.

THE COURT: YouTube.

MS. ZWANG-WEISSMAN: Yardena Zwang-Weissman for the YouTube defendants.

And Your Honor, for YouTube we can also produce snapshots for the bellwethers that have sued YouTube by June 14th.

MR. WARREN: Your Honor, may I briefly make three points?

Very briefly, first Mr. Chaput is mistaken in indicating that the plaintiffs did not ask for the DFS data until May 2nd. We asked for in it March, and we have the receipts to prove that.

Second, Mr. Chaput is right --

THE COURT: So I take it you have emails, but you don't have formal requests.

MR. WARREN: Yes, Your Honor.

Second, Mr. Chaput is right that DFS data is not due two days after bellwether identification. It is due four days after bellwether identification.

Third --

THE COURT: And with respect to the account captures, is he right, four days, not two days?

MR. CHAPUT: So --

THE COURT: Yes or no?

MR. CHAPUT: For the account captures, it's two days. For the DFS data, we're making that production on May 31st. But again, for Meta, that's a process that we began in February.

THE COURT: When I talk, you stop.

MR. CHAPUT: I apologize, Your Honor.

THE COURT: Account captures is four days under the JCCP?

MR. CHAPUT: We are doing it in two days in the JCCP, just the account captures.

THE COURT: For how many accounts?

MR. CHAPUT: We don't know yet. It's 24 plaintiffs. Each plaintiff may have multiple accounts.

THE COURT: And just the individual plaintiffs or the school districts as well?

(Simultaneous colloquy.)

MR. CHAPUT: Just the personal -- I apologize, Your Honor.

Just the personal injury plaintiffs. Judge Kuhl hasn't yet set a schedule for selection of school district

bellwethers.

THE COURT: And how is it that you're producing on May 31st when the requirement is two days?

MR. CHAPUT: So these are two separate items. The May 31st production is the production of DFS data. The DFS --

THE COURT: When are you producing or have you already produced the account captures in the JCCP?

MR. CHAPUT: We have not yet produced the account captures in the JCCP. Bellwethers will be randomly selected on June 17th, 24 personal injury bellwethers. And then two days later, the defendants will produce account captures for those 24 personal injury bellwether plaintiffs who are randomly selected on June 17th.

As I mentioned previously, we have expressed to Judge Kuhl that we are concerned we won't be able to meet that deadline, but we are going to do what we can to do so.

THE COURT: So I'm not understanding why it would be any different here.

MR. CHAPUT: The --

THE COURT: Because here -- she's -- she's given you two days. You say okay, I can't meet that. But you're telling me you need four weeks.

MR. CHAPUT: And frankly, Your Honor, four weeks from our perspective is actually the amount of time we think it's going to take to -- to get this right and -- and do it well.

And we are concerned about having to rush to do it in -- in the JCCP.

THE COURT: So have you told her that you're going to miss her deadline by four weeks less two days?

MR. CHAPUT: We have -- we have not, Your Honor. We have told her that we're concerned about --

THE COURT: What have you told her you're going to do then?

MR. CHAPUT: We have --

THE COURT: She's ordering to do it in two days.

MR. CHAPUT: We have told her that we're going to meet and confer with plaintiffs to the extent that we are unable to make that production.

We're also taking steps in advance of the June 17th deadline so that we can produce those accounts more quickly by preparing ourselves so that we -- we're -- we're in a position to roll out those productions quickly.

THE COURT: And why can't you do that here now?

MR. CHAPUT: Because we've already started those preparations for the JCCP, and so we have a month before that deadline hits. And so that's the same timeline that -- that we're describing for -- for Your Honor.

THE COURT: But they haven't been selected yet.

MR. CHAPUT: But we know which plaintiffs are bellwether-eligible.

THE COURT: All right. What else do you all want to say on the account captures?

MR. WARREN: The only thing I would add is that the bellwether-eligible plaintiffs in the JCCP number in the hundreds. Here we're talking about 12.

I would also say that, you know, I've heard for the first time a lot of arguments about burdens from the defendants. You know, we, as personal injury plaintiffs, have faced significant burdens with kids in the hospital, parents that are traumatized. We have --

THE COURT: So -- so you can't argue burden because you asked for this schedule.

MR. WARREN: I understand.

THE COURT: So -- so it's different. They didn't want this schedule.

MR. WARREN: I understand, Your Honor. My -- my simple point is just that if we can do it, they can do it.

THE COURT: Well, they're two different -- they're two different issues. I don't know what it is that they need to do.

Okay. So we've talked about account captures. Now we'll talk about the other. I needed to separate them.

So you have four days to do defendant fact sheets in the state.

MR. CHAPUT: That is not correct, Your Honor. The

defendant fact sheets are due on May 31st. For Meta, we began the process of pulling the data that we're going to produce on May 31st on February 27th.

THE COURT: Why didn't you do that here?

MR. CHAPUT: So we did include in the data that we were pulling out of -- the historical data that we were pulling out of cold storage, we did include accounts that we had identified for the MDL plaintiffs.

However, there is an MDL personal injury bellwether plaintiff whose case wasn't filed until April 1st.

THE COURT: Well, we can separate that. The rest?

MR. CHAPUT: For those cases that had been on file before February 27th and we had completed the account identification process by February 27th, we did include those in the data that we restored from cold storage.

However, as I mentioned previously, the production process for that DFS data takes approximately four weeks. And the team that is responsible for that process is currently focusing on meeting our May 31st JCCP DFS data deadline.

Additionally, because we haven't yet finalized the list of bellwether plaintiffs -- bellwether personal injury plaintiffs for the MDL, we don't yet know the full set of accounts that we're going to need to produce DFS-type data for in the MDL.

And because that production process is going to take us a month for that DFS data either way, we would submit that we

should just wait a couple weeks until we have our final list, and then we can start that production process.

Additionally that will be after the DFS production is complete in the JCCP proceeding, and so we won't need to divert resources from focusing on getting that production out the door at that time.

MR. WARREN: May I respond?

THE COURT: You may.

MR. WARREN: On June 17th, bellwethers are going to be randomly selected in the JCCP. On June 21st, the parties are ordered to provide the PFS and DFS to the court. So that's the four days that I was mentioning previously.

The defendants had access to the plaintiffs' preservation forms for all the bellwethers. So they already know, you know, a large majority, if not all, of the accounts for which these would have to -- this information would have to be pulled.

Again, to the extent that there are other accounts that haven't identified, of course we're not going to tag defendants with, you know, an obligation there, but we will work with them to get that done expeditiously.

The point here isn't to, you know, tax them with something that's impossible. It's to, you know, put them on even footing with what we're doing for the plaintiffs' fact sheets.

THE COURT: What about the fact that they relied on

the schedule that I ordered?

MR. WARREN: With respect to...?

THE COURT: With respect to the deadlines and when things were due.

MR. WARREN: Your Honor, I -- if that's with respect to the plaintiffs' fact sheets, I've addressed it, and I -- and I think that all I can do is say that we've attempted to do our very best to meet the deadlines. There is, you know, dozens if not hundreds of lawyers involved here. Our compliance rate isn't perfect, and I completely acknowledge that.

That said, we do have a stable set of, you know, certain number of bellwethers as to which we can and are moving forward. They've served discovery requests on those bellwethers that are quite voluminous. You know, so there's no sense in which that process is being halted or stalled. We're moving forward.

THE COURT: What I'm saying is under the order, they were given 45 days from the date that you -- that the fact sheets were provided, right?

MR. WARREN: Correct, Your Honor.

THE COURT: And they relied on that in their workflow, right?

MR. WARREN: Correct, Your Honor.

THE COURT: Until you filed your -- there was no --

there was no sense that this was going to be an issue until you filed your motion asking for expedited relief.

MR. WARREN: Well, Your Honor --

THE COURT: So my question is: In the orderly process, why is it that they shouldn't have been able to rely in terms of their workflow with my order?

MR. WARREN: Your Honor, I think that they should be able to rely on your order, of course. They should also be able to rely on what's happening in the JCCP. You know, there's an extent to which the ask here is relatively minor in terms of volume. It's 12 accounts or 12 -- sorry -- 12 plaintiffs.

You know, we are expediting the production of a substantial amount of fact discovery to the defendants through the plaintiffs' fact sheets process, and we are just asking for that -- that courtesy to be returned to us from the defendants.

And this is an issue that has been raised for months. I mean, it not the first time. And not only in March, but also during the informal conversations about preservation, there are extensive discussions about the need for these snapshots from defendants. They were on notice about that and have had a lot of time to prepare.

THE COURT: And what is it that you need? Why do you need the information before June 10th?

MR. WARREN: Well, Your Honor, I think --

THE COURT: What's going to happen between now and June 10th that is critical about that information?

MR. WARREN: I think to some extent, that is bellwether-specific. I know that document requests have come to the bellwethers. I know that certain depositions are already being noticed or will be noticed. At least they've identified potential individuals that they intend to depose.

THE COURT: Okay. So when are those depositions starting?

MR. WARREN: I don't think they've served formal notices. What they've done is they've identified pursuant to Judge Kang's process a list of anticipated deponents that they want an early production.

THE COURT: Beginning when?

MR. WARREN: I don't think they've --

THE COURT: When?

MR. WARREN: -- set dates for that.

MR. CHAPUT: We haven't yet set dates, Your Honor, because we haven't yet received any productions from plaintiffs, and we need documents from them beyond just what's included in the PFS before we can start taking their depositions.

We have identified certain individuals we intend to depose but haven't yet noticed any depositions.

THE COURT: For those individuals who you've identified, have you looked at their information already as part of your process?

MR. CHAPUT: For --

THE COURT: Have you gathered their information already and reviewed it?

MR. CHAPUT: For bellwethers who were selected by the defendants, we have looked at certain information.

THE COURT: Well, I tell you what. With respect to all the information you've already looked at, you produce that in the next two business days. You've already looked at it, you already have it so produce it. Understood?

MR. CHAPUT: Understood, Your Honor.

THE COURT: All right. With respect to the balance, what is it that you're going to do with that information in terms of needing it so quickly to upend the process that was previously ordered?

MR. WARREN: Your Honor, we don't want to upend anything, and I think that's not the -- not the goal here.

THE COURT: It is. You're asking me to change my order.

MR. WARREN: Your Honor, what we would do with that information is we would help prepare the witnesses, we'd help prepare the client, we'd help understand and evaluate the case and its merits, I mean do all the things we would ordinarily

do in working up a case.

THE COURT: I understand that, but you don't even have depositions set.

MR. WARREN: No. That's true.

THE COURT: Anything else on this topic?

MR. WARREN: Not from the plaintiffs, Your Honor. I think if the -- yeah, not from the plaintiffs.

MR. CHAPUT: The only thing I'd note, Your Honor, is we hear Your Honor on the account captures issue. With respect to the DFS-type data, I would just ask that we have the opportunity to meet and confer further with plaintiffs.

I hear Mr. Warren saying he's hearing new information about burden. That's information that -- we had shared previously in the context of the JCCP DFS negotiations, but if Mr. Warren hasn't heard it, I'd like the opportunity to confer with him about those burdens so that we can reach a schedule that meets plaintiffs' needs but also addresses the burdens on the defense side of the --

(Clarification by the Certified Stenographic Reporter.)

MR. CHAPUT: That address the burdens on the defense side. I just think that a little bit more conferral on the DFS-type data specifically would benefit both sides.

THE COURT: Okay. You have the weekend. I want something on file with respect to your meet and confer by noon on Monday.

MR. WARREN: Very well, Your Honor.

THE COURT: And if you can't agree, I'll issue my order.

MR. WARREN: Thank you, Your Honor.

THE COURT: Next issue, with respect to the supplemental briefing on the motion to dismiss with the school district plaintiffs from Utah and Arizona, your stipulation that's filed at 847 is agreeable to me.

So I understand that to be that you agree that Arizona and Utah look to the restatement, but if I ultimately deny on a particular narrow issue with respect to Utah law, I'll give you an opportunity to brief the unlawful conduct part of the prong.

That's what I understand it to be.

MR. WEINKOWITZ: That's my understanding, Your Honor.

MS. HARDIN: Your Honor, our position is that the issues that we're going to discuss today that are generally applicable under the restatement, we'll be asking Your Honor to dismiss the cases on those grounds.

Only if Your Honor were to deny the defendants' motion on all bases, we believe we have an additional basis under Utah law which is that the conduct must be unlawful, and we would like the opportunity to brief that. We certainly hope it won't be necessary, Your Honor.

THE COURT: Okay. I understand the agreement. So

the stipulation at 847 is approved.

MR. WEINKOWITZ: Thank you, Your Honor.

MS. HARDIN: Thank you.

THE COURT: Okay. There is a Meta motion to submit supplemental authority at 844. That too is granted.

Do the states want -- I don't know if the states agree or don't agree and whether they need an opportunity to weigh in.

MS. OREM: Good morning, Your Honor, Beth --

THE COURT: Good morning.

MS. OREM: Beth Orem for the state AGs.

We are planning to file a motion -- or I'm sorry, not a motion. We're planning to file a response on Monday because there are some inaccuracies --

THE COURT: From your perspective?

MS. OREM: Yes. In the chart. And had Meta conferred with us, we perhaps could have resolved those earlier.

THE COURT: Okay.

MS. OREM: But we don't oppose.

THE COURT: Okay.

Your request to file a response is granted.

MS. OREM: Thank you, Your Honor.

THE COURT: Thank you.

All right. They've got issues with -- well, they're outstanding. I had -- Mr. Warren, you made mention of more.

I only had three motions to dismiss at this point.

So I have a case filed by BS. This is Docket 22-2495. Defendants didn't consent, but they did not oppose.

MR. WARREN: I'm sorry what -- could I trouble Your Honor to repeat that docket number?

THE COURT: 22-CV-2495.

MR. WARREN: Um-hmm.

THE COURT: So what I show is plaintiffs have filed a motion for voluntary dismissal. Defendants did not consent but did not oppose even though it was one of their picks. So I was going to grant that request given the lack of opposition.

MR. WARREN: Thank you, Your Honor.

THE COURT: The next one I have, 22-6423, *Casteel*, defendants did consent to that one. That is granted. But whoever the plaintiffs' lawyer is on that one, if you would please make sure to file that stipulation in the member case docket, not just the MDL docket.

MR. WARREN: Thank you, Your Honor.

THE COURT: And then the last -- I guess I need something on this one. This is *Araluce*, A-R-A-L-U-C-E, 23-5073. This is not a joint stipulation. I don't have any statement from the defendants.

What is the defendants' position on this one?

MS. SIMONSEN: If you give me a moment, Your Honor,

I'll try to ascertain. We've had a number of requests for dismissal.

THE COURT: Okay. Ms. Simonsen.

Those are the three that I have.

While she's checking, Mr. Warren, are there others we can deal with today?

MR. WARREN: Your Honor, I don't know if there are others that -- well, it's possible. I am aware of at least one case where there -- I'm not sure if the dismissal was granted or not. That's 22-CV-6692.

I'm hesitant to say the name only because I don't know in my notes whether I have a minor name or not.

THE COURT: Okay.

MR. WARREN: I believe the defendants have agreed to that -- that dismissal on May 15th. That's what my notes say. But of course Ms. Simonsen can correct me if I'm wrong.

THE COURT: We can check as well.

MR. WARREN: And then I believe the others that I had referenced were -- there was a notification of intent to dismiss, but I do not believe there's a pending motion to dismiss for those.

THE COURT: Okay. While she's checking, there -- I've got some questions about plaintiffs' motion to seal at Docket 811. This is the sealing of the bellwether briefs, and it's just -- there seem to be some inconsistencies with

respect to redactions. Some health information is redacted. Others is not redacted. There is no -- I don't know if this is just because people were rushing or if it is actually that -- I need someone to go back and check from the plaintiffs' side whether or not the request needs to be amended because we're seeing lots of inaccuracies -- I mean inconsistencies.

MR. WARREN: Inconsistencies.

Well, I will say, Your Honor, I certainly will go back and check and have the lawyer responsible for that on our team check. There was a fairly, I think, significant effort to work with the defendants to make sure there was agreement on what should and shouldn't be redacted so that inconsistencies may just be a function of the parties trying to negotiate through that.

THE COURT: Okay. And -- and that's fine, but if someone could just take a -- take a look at it again and you can just even send me an email --

MR. WARREN: Sure.

THE COURT: -- or chambers an email that says we've met and conferred and this is the way we've agreed to do it, I would appreciate it because --

MR. WARREN: Of course, Your Honor. And that email will be coming from Mr. James Marsh who's our sealing czar for the plaintiffs' leadership.

THE COURT: Okay. It is a thankless job.

MR. WARREN: Indeed which is why I called out his name in gratitude.

THE COURT: Is he here so I can thank him too?

MR. WARREN: I don't know if he is. I don't believe so. But he may be listening.

MS. SIMONSEN: Your Honor, I do have the answer on the *Araluce* matter, 23-5073. The defendants informed the plaintiffs that we would consent to the dismissal of that case with prejudice. And that is because plaintiffs informed us that the plaintiff no longer wishes to pursue her case.

THE COURT: Okay. So that request is granted and it's dismissed with prejudice.

MS. SIMONSEN: Thank you, Your Honor.

THE COURT: Again, will you make sure that the -- I don't have a note that it hasn't been filed on the member case docket, but we need it in.

MR. WARREN: May I just briefly confer with Ms. Simonsen on that issue?

THE COURT: Yes.

(Off-the-record discussion.)

MR. WARREN: Your Honor, thank you for the brief intersession.

I am not aware of whether that motion was filed with -- by those attorneys to dismiss without prejudice or with prejudice

so it may be a contested issue. That's one thing I would just appreciate the chance to check the docket on.

THE COURT: Okay.

MS. SIMONSEN: Your Honor, I have confirmed that the -- with respect to *Araluce*, it was filed on the member case docket and the notice did say plaintiff was dismissing with prejudice. They simply did not note defendants' position on the issue in their motion.

THE COURT: Okay.

MR. WARREN: Very well. So there's no issue there.

THE COURT: Great. Thank you.

Okay. Is anyone here from the Di Cello Levitt firm? They filed a motion to withdraw as counsel in 22-63 -- 6263.

MR. WARREN: Your Honor, I'm doing a visual scan. I don't see any lawyers from that firm present.

I am aware of that -- of that motion, however.

THE COURT: Okay. We will deal with that in writing, then.

Just a footnote back on your issues with defense production. I'm going to see Judge Kuhl over the next few days at the American Law Institute's annual meeting. So to the extent that you think that there is information that we both should know, you should put that in the filings so she and I can talk about the issues. Okay?

Bellwether issues. Here the defendants are asking for

relief as opposed to the plaintiffs.

MS. SIMONSEN: My colleague Andrea Pierson will address that, Your Honor.

MS. PIERSON: Thank you, Your Honor.

Andrea Pierson, Faegre Drinker, for the TikTok defendants.

As we outlined in the CMC statement, Your Honor, you may recall that we discussed the dismissal or refusal to waive *Lexecon* in half of the defendants' bellwether picks at the last hearing.

Following that hearing, you issued your order on April 23rd and finalized the nine picks and ordered the defendants to choose three more as replacement picks.

On May the 3rd, we learned that yet another bellwether pick by the defendants would be dismissed. In our view, Your Honor, this creates an unlevel playing field that cannot simply be cured through another replacement pick.

So as we noted in the CMC statement, Your Honor, we asked for three forms of relief. The first of those is an additional strike for the defendants -- excuse me -- as opposed to a replacement pick.

Our view is that the effect of plaintiffs' dismissals of the defendants' bellwether choices and the refusal to waive *Lexecon* creates unfair prejudice that cannot be cured. It acts essentially as strikes on the defendants' picks, and that's not something that we can simply fix through

replacements.

THE COURT: Can I ask you a question? On -- I haven't -- it just occurred to me as I'm sitting here listening to you.

With respect to *Lexecon*, do those cases go back to a federal court in those jurisdictions or back to a state court?

MS. PIERSON: Back to the federal transferor court, Your Honor. They would stay -- in this proceeding, they'd be transferred ultimately for trial back to the -- to the transfer court.

THE COURT: What if I tried them in that jurisdiction?

MS. PIERSON: You can do that, Your Honor.

THE COURT: Would that help?

MS. PIERSON: I -- potentially, yes. I mean I'd want the opportunity to confer with my codefendant counsel, of course, but it is within Your Honor's discretion to try those cases in a different jurisdiction, the transferor jurisdiction.

THE COURT: Because it's just a different jury pool.

MS. PIERSON: That's right.

THE COURT: Well, I would consider that.

MS. PIERSON: You may recall, Your Honor, that your deadline for the -- the plaintiffs to object or waive *Lexecon* is today.

THE COURT: Right.

MS. PIERSON: I think we'll have a fulsome report for you on how that affects the pool after today's deadline. We frequently get these things on the last day so I don't have a complete report for you today except to say that the number is somewhere between 25 and 30 plaintiffs who have notified us that they will not waive *Lexecon*. But I do think that's an issue that is worth evaluating once we get beyond today's deadline as --

THE COURT: I think -- I think it would be helpful to have those two pieces of data before making a decision. So one is you should check with your clients and see if I tried the case in those other jurisdictions whether that makes a difference. That would be one.

Second, we need to know what the full pool looks like. So I think what I could do is when I have that information, I can meet with you all online to get kind of, you know, final thoughts before making a decision.

So why don't we wait on this. It's always interesting to me to try cases in different places. I tried one up in Eureka, a 1983 case, and it was terrific. Got to know a different population up there. So that might be a fun thing to do.

Okay. So why don't we -- why don't we wait on that. It takes my computer a while to get the calendar up. And before

we leave today, I'll give you a time next week so we can discuss it with more information.

MS. PIERSON: Thank you, Your Honor.

THE COURT: Okay. Thank you.

MR. WARREN: Thank you.

THE COURT: All right.

I believe that's it, right?

Oh, no. I guess YouTube wanted to discuss a protocol.

And then again before we leave, let me make sure I get an update from you on the discovery issues, but I do want to get to the oral argument here. It's almost 9:00 o'clock.

All right. So YouTube.

MS. ZWANG-WEISSMAN: Thank you, Your Honor. Yardena Zwang-Weissman for the YouTube defendants.

Your Honor, we're asking the Court simply for an orderly fair process through a protocol to address the amendments of short form complaints in this case.

And of particular concern to our client in particular here are plaintiffs' recent attempts to amend the complaints to add YouTube as a defendant in a number of cases.

And this concern, Your Honor, is not just hypothetical. Since we were before Your Honor last a few weeks ago, there have been at least 14 attempts by the plaintiffs to add YouTube as a defendant to various cases.

And importantly from our perspective, one of those cases,

Clevenger, has already been selected by the defense as a bellwether pick. So changing the composition unilaterally at this point in time by the plaintiffs after bellwether selection is particularly concerning to our client.

So at this point in time, Your Honor, we're not asking you to weigh in on that issue in particular. We're just asking for a fair process which we think can be implemented through a protocol so that all defendants, even those that plaintiffs attempt to be named in future cases, A, have notice that plaintiffs intend to amend cases to add those defendants or make other substantive amendments to the cases, and, B, have an opportunity by way of filing an objection to discuss those issues with Your Honor, object, and then we'll have that discussion with the Court in due course.

THE COURT: I think that's fair. Why shouldn't it -- why shouldn't that discussion -- especially when you're adding in parties, why would you object to that notion?

MR. ANDREWS: Good morning, Your Honor. Patrick Andrews, Lieff Cabraser, for the personal injury plaintiffs.

The reason why that proposal should not happen is because it's contrary to the federal rules. And it's --

THE COURT: It's contrary to the federal rules? Do you know that they could bring a motion to dismiss under the federal rules if they're added after and we've already gone through a significant amount of work to pull this thing

together in an organized manner, and you think it's a problem?

MR. ANDREWS: It's contrary to the federal rules -- I'll -- Your Honor proposed the exact process through which YouTube can assert its rights, which is a motion to dismiss.

THE COURT: So you want me to go through yet another round of motions to dismiss so that you can randomly and late belatedly add people -- add defendants to your cases.

MR. ANDREWS: It's -- it's not that we want another round of a motion to dismiss. It would be similar to what Your Honor ordered with respect to Snap's plaintiff-specific motions to dismiss which relate only to short-form complaints.

Your Honor could order some other --

THE COURT: Why are you doing this?

MR. ANDREWS: The reason we are doing this, Your Honor, is because under the rules plaintiffs are entitled to amend their complaints by the consent of the existing defendants.

There is no requirement that plaintiffs inform the not-yet-named defendants and seek their consent before --

THE COURT: So all the defendants have consented?

MR. ANDREWS: In many cases, or in at least some cases, the other defendants have consented to plaintiffs' request for an amendment, and then the plaintiffs have simply filed their amended complaints. That's the process that Rule 15(a)(2) envisions. If the exist --

THE COURT: With respect -- I don't care about minor changes. I am asking whether the defendants consented to adding a defendant.

MR. ANDREWS: Correct.

THE COURT: And you didn't discuss that with the other defendants?

MS. ZWANG-WEISSMAN: So, Your Honor, absolutely we have when we knew about it. So this is not a one-off case where plaintiffs don't know who represents YouTube in these proceedings, you know, a to-be-named defendant where they have no idea who counsel is.

THE COURT: But why -- so I don't understand why -- why it's an issue if I've got other defendants who are totally fine with you being added as a defendant.

MS. ZWANG-WEISSMAN: Your Honor, in each instance where YouTube -- where plaintiffs have proposed to add YouTube as a defendant in the federal proceeding, there have been -- all of the defendants have not yet consented in those instances.

So those 14 cases that I mentioned at the beginning of this discussion, Your Honor, have not received -- there have been not been full consent by all the defendants to date.

That is why we are coming here today, Your Honor, to propose an orderly process so that we don't have to intervene with a Rule 24, you know, intervening procedure. We don't

expect a flurry of motion practice or paperwork for us and the parties and the Court to have to deal with.

There's a very simple process here where plaintiffs can just provide notice in those same emails that they send to other defendants, to counsel for YouTube so that there's not a race on plaintiffs' part to, A, file an amendment to a short-form complaint, or B, from YouTube's perspective to somehow hope that the others defendants catch that the email wasn't also addressed to YouTube so that we can hurry in and file a motion to intervene.

That seems superfluous and inefficient in an MDL like this, and there's a much simpler process to go about getting us to the right result.

THE COURT: I would agree.

You will, you will -- I am not going to focus on this right now. You will come up with a protocol that gives them the proper ability to object to the extent that they believe that they should for your belated attempt to add a defendant at this juncture. You will do that.

And in fact, you will do that right now. You'll go out to the conference room and figure it out while I take argument on the rest of these motions. Do you understand me?

MR. ANDREWS: Understood, Your Honor.

THE COURT: All right.

MS. ZWANG-WEISSMAN: Thank you, Your Honor.

THE COURT: Okay. Let's get to the argument.

MS. SIMONSEN: Your Honor, I'm sorry to interrupt. Ashley Simonsen.

There was one additional case management issue that we were hoping to address, which is the school district bellwether selection.

THE COURT: Well, are we going to deal with that? Are we going to deal with that after we know the *Lexecon* objections?

MS. SIMONSEN: I'll defer to my colleague, Geoffrey Drake for the TikTok defendants.

MR. WEINKOWITZ: We know, Your Honor. Yesterday we found out that Warshaw will -- will not waive *Lexecon*. So what we do now have is a full complement of school -- of school district bellwether plaintiffs.

THE COURT: Okay. But you've not talked to your client about my offer to try these cases.

MR. DRAKE: Geoffrey Drake from King & Spalding for the TikTok defendants.

That's correct, Your Honor. We'd like the opportunity to do that, including the original two that led to this process, Baltimore and Dekalb. And being from Atlanta, I'd welcome Your Honor perhaps to the Northern District of Georgia for our trial. So we'll talk to our clients about that, and perhaps we could lump that in with the schedule that you're

contemplating on -- on the personal injury side.

THE COURT: I think you should.

MR. DRAKE: Okay.

THE COURT: I'll just fly all over the country and try these cases.

MR. DRAKE: Thank you, Your Honor.

MR. WEINKOWITZ: Thank you, Your Honor.

THE COURT: Thank you.

All right. Let's get to the argument then.

So first we'll deal with the derivative injury rule.

Okay. Good morning. Why don't you state your appearances again, and then we'll get started.

MR. MURA: Good morning, Your Honor. Andre Mura for the plaintiffs.

THE COURT: Good morning.

MR. PISTILLI: Good morning, Your Honor. Christian Pistilli, Covington & Burling, for Meta.

THE COURT: And that's P-I-S-T-I-L-L-I?

MR. PISTILLI: Yes, Your Honor.

THE COURT: All right. Your motion. You may proceed.

MR. PISTILLI: Thank you, Your Honor.

I'm going to be addressing the two related issues of proximate causation, derivative injury, and then the remoteness argument.

Start with the derivative injury argument. And here the core of the school district's claim is that defendants' services are allegedly addictive, that their students suffered mental health harms as a result of treating and otherwise responding to their students' mental health harms, and then the school districts incurred costs in responding to those harms.

As the plaintiffs themselves emphasized in their briefs, they're bringing claims as first responders to what they call a health crisis. And we'd submit, Your Honor, that under a long line of cases, proximate causation is lacking in such cases because the injuries are derivative of harms to third parties, in this case the students.

And the Ninth Circuit's decision in *Association of Washington Public Hospitals* we think is particularly illustrative here. The plaintiffs in that case were public hospital districts, so quite analogous to the public school district plaintiffs here. And like the plaintiffs here, they brought state common law claims including public nuisance claims.

Now the defendants in those cases were tobacco companies. The plaintiffs in *Washington Hospitals* alleged that the defendants concealed the addictive nature of their products.

Likewise here, the plaintiffs allege that defendants misled and failed to warn the public about the allegedly

addictive nature of their services.

Then the plaintiffs in *Washington Hospitals* alleged that as a result of their patients' use of defendants' products, they incurred increased costs in treating their patients' tobacco-related illnesses.

Similarly here, the school districts allege that they incurred increased costs to treat their students' mental health issues allegedly caused by defendants' services.

And in *Washington Hospitals*, the Ninth Circuit dismissed the plaintiffs' claims as impermissibly derivative, noting that, quote, without injury to smokers, plaintiffs would not have incurred the additional expenses in paying for medical the expenses --

THE COURT: I understand your reliance on *Washington*. Address, though, defendant -- I mean plaintiffs' case of the *Labor Local 17 vs. Phillip Morris*.

MR. PISTILLI: I'm sorry. Could you repeat that, Your Honor?

THE COURT: Oh, no. You did that one as well. All right. Keep going, that's fine.

MR. PISTILLI: Well, yeah, Your Honor, we'd submit that case is really on all fours with *Washington Hospitals*. Without any alleged injury to students, the school districts would not have incurred additional expenses in paying for their students' mental health costs.

THE COURT: Okay. A response, Mr. Mura, on that case.

MR. MURA: On which case? I'm sorry, Your Honor.

THE COURT: The *Washington*.

MR. MURA: Yes, Your Honor. That was a case that both Judge Orrick, in *Juul*, and the Federal District Court, in *City of Everett*, the District Court from Washington, both distinguished that case as being about damages for unreimbursed medical expenses.

So when you're talking about unreimbursed medical expenses, you're talking about a derivative injury because the financial loss is the same.

Here we have -- the school districts have not alleged a derivative injury. They have alleged harm caused by defendants' actions. And that harm goes in multiple directions.

THE COURT: So it's a pass-through.

MR. MURA: It's not a pass-through, Your Honor. It's a harm that goes in multiple directions. It goes directly to school-aged children. And it goes directly to the schools and local governments.

The difference here is, for example, there are two categories of harms that -- that the school districts have alleged, prevention costs and mitigation costs. Prevention costs are not purely derivative because they occur prior to

students' personal injuries, and they're incurred even if a student is not personally injured.

THE COURT: So let me ask the defendant, then, if I don't find -- if I find that they're not reimbursement, that they're not pass-throughs, but that they are prevention, how does that case apply?

MR. PISTILLI: Well, they allege a couple categories of injuries here, Your Honor. But the main category of injury they allege, and this is clear in their complaint and in their briefing, is treating mental health harms to students. They say that --

THE COURT: So that --

MR. PISTILLI: -- they're the treaters.

THE COURT: That could be one component. That wasn't my question. My question is to the extent that I find they've alleged damages that are not pass-throughs, and not reimbursement costs, how does the case apply?

MR. PISTILLI: So we would submit that the case applies equally. And we think that the *City of Philadelphia v.* --

THE COURT: Preventative costs? For preventative costs?

MR. PISTILLI: Yeah, so that's addressed, Your Honor, in, we think, *City of Philadelphia v. Beretta*, which is a Third Circuit case, and applying the same derivative injury

argument. And plaintiffs made, you know, essentially the argument that plaintiffs' counsel are making here.

THE COURT: So then the answer to my question is *Washington Public Hospitals* doesn't apply if that's what I find. You need to rely on a Third Circuit case for the hypothetical that I am submitting.

MR. PISTILLI: We think *Washington Public Hospitals* is most directly applicable to the mental health injuries they allege. We think the same principle of derivative injury, though, that the Ninth Circuit applies in *Washington Hospitals* equally applies to other costs that plaintiffs would not have incurred but for injury to their students.

I was just pointing Your Honor to the *City of Philadelphia* case because it squarely applies this reasoning, the reasoning from *Washington Hospitals*, to plaintiffs' argument where they attempted to say no, no, no, some of our -- some of our injuries are different. In *City of Philadelphia* they said we have to police gun violence. Policing gun violence doesn't directly flow through injuries to shooting victims. And the Third Circuit said no.

(Simultaneous colloquy.)

THE COURT: -- *City of Philadelphia*.

A response.

MR. MURA: Your Honor, *City of Philadelphia* was a case in which there was no proximate because as the First

Circuit explained in *Estados Unidos Mexicanos*, in that case, the -- the City of Philadelphia had alleged that mere awareness that the defendants' gun manufacturers knew that their guns were being used in improper ways. But here --

THE COURT: Well, isn't there a circuit split between the First and the Third on this topic?

MR. MURA: On the question of whether --

THE COURT: On derivative injury from firearms.

MR. MURA: I -- I think that's fair, Your Honor.

THE COURT: Okay.

MR. MURA: I think that's fair.

THE COURT: So *City of Philadelphia* helps defendants. *Estados Unidos* helps you.

MR. MURA: That's correct.

THE COURT: And is there a Ninth Circuit case that either of you found -- because I'm not seeing one in my notes here -- that addresses where the Ninth falls on the topic?

MR. MURA: We have Ninth Circuit District Court cases, Your Honor, but not a Ninth Circuit case.

We do think that reading *Washington Public Hospitals*, its understanding of when -- when something is purely derivative is supportive of plaintiffs. One, *Washington Hospitals* was a RICO cause of -- a RICO case.

And so there are cases such as *City of Everett*, a federal case from Washington, which has distinguished *Washington*

Public Hospitals on that basis.

But the court in *Juul* also talked about both preventative costs and these types of mental health-related costs.

Those are not costs that are where the school districts are seeking reimbursement or to pay directly for the mental health care costs of any students. So that is entirely distinguishable even under existing Ninth Circuit precedent.

THE COURT: Mr. Pistilli, the derivative injury rule appears to be rooted in federal antitrust and RICO proximate cause doctrine rather than state law proximate cause.

Why should I -- well, first of all, do you agree with that premise?

MR. PISTILLI: Respectfully, Your Honor, I don't, and I think the best I can do there is to quote from the *Washington Hospitals* decision where the Ninth Circuit said quote, the hospital district's common law claims fail for the same reasons their RICO -- their federal antitrust and RICO claims failed.

THE COURT: Yeah, but it extended it. It didn't say that it wasn't rooted in the federal antitrust and RICO standard.

MR. PISTILLI: Yeah, it's rooted in it, but it went on to say the proximate cause test is -- the proximate cause test in RICO is the common law proximate cause test. So the Ninth Circuit has said the common law test is the same as the

RICO antitrust test.

THE COURT: Do you agree with that?

MR. MURA: No, we do not agree. And the District Courts and the Ninth Circuit do not agree with that.

MR. PISTILLI: Respectfully, Your Honor, the Ninth Circuit said it's the same test.

THE COURT: So your best case for the Ninth Circuit saying it's not the same test?

MR. MURA: Well, Judge Orrick in *Juul*.

THE COURT: Ninth Circuit. I am a huge fan of my colleague across the Bay, but he's not on the Ninth Circuit.

MR. MURA: Yes, Your Honor. Well, I would respectfully submit that that's a misreading of that case because there is no right to -- there is no tort action for reimbursement of damages under the common law so the statement that that would not be recognized under the common law is not a statement that we disagree with. But that does not mean or redefine derivative injury in the way that defendants are trying to redefine it here to require this extension where the costs borne by the -- by the schools are entirely distinct and unique and are not the reimbursement of specific costs for schools.

And I think the cases that we've cited make that point explicitly. And it's -- for example, on page 20 of our brief, we discuss the City of Boston against Smith & Wesson. This is

a Massachusetts Superior Court decision that's been cited by numerous courts as persuasive.

The court explained there that wholly apart from any harm caused by the defendants which comprise the public entity's community and regardless of when -- whether any individual is harmed, the community itself, the public entities suffer their own distinct harms.

And those are the distinct harms that the plaintiff school entity and local governments here have alleged, not any sort of harms or costs that the school -- school children have suffered.

And, in fact, it's quite obvious that there isn't overlap because the reason for the derivative injury rule is you want the proper plaintiff to be vindicating the rights. But the school children could not be seeking to vindicate the financial losses that the school districts have alleged here. These are separate harms, separate injuries that need to be separately vindicated in separate lawsuits.

MR. PISTILLI: Your --

THE COURT: Go ahead.

MR. PISTILLI: So, first, briefly on the *Smith & Wesson* case, it's telling that that's what they went to. It's an unpublished trial court opinion. It's from Massachusetts which is a jurisdiction that's not at issue in our motion. It's a case that relied on a Massachusetts pleading rule that

motions to dismiss are not appropriate vehicles for, quote, resolving undecided points of substantive law. That's obviously not the way it works in federal court.

And it's also inconsistent with a number of the other gun cases from appellate courts in jurisdictions at issue. There's the *Gamin* case from Connecticut. There's the *City of Philadelphia* case we've discussed from the Third Circuit. There's the *Penelas* decision which was affirmed by an appellate court in Florida. There's *People v. Sturm, Ruger* in -- in New York. So that -- that's *Smith & Wesson.*

And then on the *Juul* decision, Your Honor, we would submit that *Juul* actually distinguishes this case in the decision in its discussion of *Washington Hospitals*. It was very significant to Judge Orrick in *Juul* that the plaintiffs there were not seeking treatment expenses on behalf of students. The court essentially said, well, if you're seeking medical treatment expenses, that's *Washington Hospitals*.

Here, plaintiffs clearly are seeking that. We would submit that it is their principal injury alleged in the complaint. And so even under *Juul*'s reasoning, we think the fact that what they are seeking is medical treatment --

THE COURT: But -- but your argument in that respect only goes to a portion of the alleged damages.

MR. PISTILLI: That -- that's -- that's right, Your Honor. We at least agree --

THE COURT: So that wouldn't be a basis for granting the motion --

MR. PISTILLI: Well --

THE COURT: -- given that other damages have been alleged.

MR. PISTILLI: Well, we think it would certainly be appropriate, you know, especially in the context of an MDL, Your Honor, to provide guidance on this given that, you know, in *Juul* it was very significant to the court that there were -- no treatment expenses were sought.

And -- and as I said earlier, you know, while it's not directly addressed in *Washington Hospitals*, the great weight of appellate authority on these derivative injury cases recognize that it extends more broadly than just the -- the direct treatment expenses. Really the test is would the schools be incurring these expenses but for the injury to their students.

And if there weren't, in the school's views, issues relating to use of -- of social media, they wouldn't have to be taking, you know, the -- the sort of preventative or education steps that -- that they claim. And -- and there again, you know, we just think the *City of Philadelphia* case is very instructive in that, you know, police and gun violence was assumed within the role.

THE COURT: I want to move to a question about the

distinction you're making between remoteness and foreseeability.

Are you making a distinction between those two concepts?

MR. PISTILLI: Yes, Your Honor. We --

THE COURT: Okay. Then if you're making a distinction between those two concepts, identify for me the objective factors which would create a difference between remote and foreseeability. What are the objective factors that any judge should look at?

MR. PISTILLI: The -- I'm sorry, Your Honor.

THE COURT: I just want a list.

MR. PISTILLI: That number of steps, intervening conduct, whether, you know, time, place, wrongdoing of third parties, those -- those all go to --

THE COURT: Number of steps. So what would be the number of steps to make one foreseeable versus remote? Give me an example of that.

MR. PISTILLI: Sure. Well, I think there's an example that comes straight from the plaintiffs' complaint, which is --

THE COURT: I'm asking for case law, not -- not their complaint. I'm looking for objective factors based in the case law, number of steps.

MR. PISTILLI: Well, I would think that the *City of Chicago* case, Your Honor, which was another case involving gun

violence where the -- the court essentially said that the -- the intervening acts of the --

THE COURT: How many steps?

MR. PISTILLI: Well, there I think it was just the intervening act of the people who wrongfully --

THE COURT: Okay.

MR. PISTILLI: -- used the firearm. So it was just the one intervening step in that case. Though I don't know that there's a numerical test.

THE COURT: You made the statement that the objective factor that the court should consider is the number of steps between remote and foreseeable.

MR. PISTILLI: Yes, but in -- in some cases the intervening acts of a third party is sufficient. So that would be essentially one step between the --

(Simultaneous colloquy.)

THE COURT: So it's not -- so it's foreseeable but not remote? Or it's remote but not foreseeable?

MR. PISTILLI: It would be too remote. Like in the gun violence cases, it's too remote where between the defendants' alleged wrongful conduct and then injury is, one, the wrongful acts of people using the firearms, and then two, the pass-through injury to the, you know, in those cases it was largely cities.

THE COURT: What is -- what is -- so which of those

standards -- I -- I take it you believe that foreseeability is less remote?

MR. PISTILLI: So --

THE COURT: Or is remote? Yeah, tell me.

MR. PISTILLI: So first, Your Honor, in the *Bank of America* case, the Supreme Court said, you know, discussing the general common law rule that proximate cause encompasses more than foreseeability. We have footnote 23 of our reply brief. We cite a case from each of the relevant jurisdictions that you know, in some fashion or other embraces the concept that proximate causation may be lacking even where the injury is foreseeable.

I think a really great example of this, Your Honor, is the *Modisette v. Apple* case from the California Court of Appeals. That was a case where the plaintiffs sued after they were struck in their vehicle by someone who was using FaceTime while driving.

And the reason I think that case is really instructive, Your Honor, is the California Court of Appeals says yes, it was foreseeable that this could happen. And yet it says that nevertheless, legal causation is lacking because simply Apple's conduct is too remotely connected to the injury for the law to allow a claim to go forward against Apple because that was, Your Honor, a case involving the sustaining of a -- of a demurrer. So that, I think, really illustrates the

point.

THE COURT: Well, it's an illustration, but it doesn't give me any objective factors. And it does seem like you don't really have -- you said number of steps, but you don't really mean it because you can't really identify anything objectively to substantiate that first -- that first statement of yours.

MR. PISTILLI: Well, no. It's -- I think the -- the -- the linchpin is that there is some sort of intervening conduct. I think depending upon the facts of the case, one step is oftentimes sufficient. But certainly the Court can --

THE COURT: But the quantity, it doesn't seem to matter to you.

MR. PISTILLI: Well, we would submit that in many cases one intervening step can be enough. Here, though, there are actually --

THE COURT: Okay. It's not -- so what's your other objective factor?

You're not persuasive on the first. Is there another objective factor that courts should consider in determining the difference between foreseeability and remoteness?

MR. PISTILLI: Well, it's really sort of whether the wrongful conduct of a third party is sort of the -- the --

THE COURT: Do you understand what I'm trying to get at? Maybe you have a response.

MR. MURA: Yes, Your Honor.

THE COURT: Any objective considerations to determine the difference between foreseeability and remoteness?

MR. MURA: Your Honor, I think it's a fact-based inquiry that is rarely decided at the motion to dismiss stage. And I think the difference here is that that defeats the remoteness argument under any sort of objective considerations is the fact that plaintiffs here have alleged that the defendants intentionally acted.

I mean they engaged in direct affirmative conduct in creating a marketing and addictive product to school children which directly and foreseeably harmed school districts.

And so that's a big difference between the cases that my friend on the other side is discussing, like most of that against Apple --

THE COURT: But their marketing here is really quite different, isn't it, than what they were doing in *Juul*?

MR. MURA: I don't think so. I don't think so, Your Honor. I mean we've alleged, for example -- we've alleged that they infiltrated schools to make -- to make their products in schools a top priority. This included the SNAP to School program, back-to-school nights, Google's Tips & Tricks for beginning YouTube into the classroom.

We've also alleged that their own internal studies and public studies have shown the direct links that made it

foreseeable that if you market an addictive product to school children, it's going to affect schools.

And particularly given the allegations of intentional conduct here, that distinguishes this case from cases like *Modisette* where someone merely furnished a condition by which injury could occur.

Here, the defendants marketed a knowingly addictive product directly to students during school hours. I mean the complaint is replete with these allegations.

Now defendants may want to present a different story, but that's not appropriate at the motion to dismiss stage where these allegations, because they're plausibly pled, need to be accepted as true.

The other case I would point to you --

THE COURT: So you haven't provided citations or -- or you -- I've got this in the reply brief, his reference to footnote 23, which came in on reply.

MR. MURA: Yes, Your Honor.

THE COURT: Do you have cases to the contrary with respect to their, you know, claim that it's well-established principle of common law that the plaintiffs are supposed to show that their alleged harms are not remote?

MR. MURA: We disagree with the -- with the cases in footnote 3 [sic] insofar as they've been described. I think --

THE COURT: Twenty-three or three?

MR. MURA: In footnote 23. When we looked at those cases, they're basically just talking a foreseeability analysis. And of course if something is unforeseeable, it may be unforeseeable because it's too remote, it's too attenuated.

But the case law is clear that that foreseeability question is a question of fact that shouldn't be decided at the motion to dismiss stage.

And in any event, there's nothing too remote about the fact -- about the chain of causation here. The same argument was made to the First Circuit. And the First Circuit said, sure, you can always fashion a multiple -- a long chain of causation, but that's not the relevant question. The question is whether it's foreseeable. And that is consistent with many of the cases cited in footnote 23 by defendants.

THE COURT: Do you have an example of marketing during school hours?

MR. MURA: We do in the complaint. We have an example for SNAP, for example, where they -- where they did an update during the school that was highly disruptive. We have an -- examples of the programs that I just talked to you about where the -- each of the social media companies were targeting schools themselves and trying to infiltrate the schools with their products to show how they were helpful to education.

So I do think that there -- there are marketing

allegations here. And if the question is are they sufficient, surely they are, and they establish the intentionality of defendants' conduct. And that more than makes it foreseeable for purposes of the motion to dismiss stage.

I would also -- in response to some of these intervening cause arguments that defendants have made, I would point the Court to the *Ileto* decision which is a Ninth Circuit decision that the court has already cited in its prior motions to dismiss but deals with causation as well and talks about how the fact that there are links in the causal change involving third-party actions, even criminal actions, does not defeat proximate cause where those actions are foreseeable.

So, again, it just comes down to foreseeability. And *Ileto* is also helpful because it talks about how foreseeability may arise directly from the risk created by the original active negligence.

And so here --

THE COURT: So can you make a distinction for me -- it's easier to see the distinction in *Juul* between product design versus specific marketing to determine choice.

MR. MURA: Well, Your Honor, I think the -- the marketing and the targeting in *Juul* are highly similar in that it was an addictive product that the defendants in both cases --

THE COURT: Yeah, but they weren't talking as -- I

mean, here we've got a platform, and we've -- and I've at least made distinctions between aspects of the platform that could be viewed as products and aspects of the platform that could not.

In *Juul*, the focus was less on the product other than -- but -- but more on the marketing knowing that the product was a product.

So I'm trying to -- to thread whether the allegations here relate to product issues or marketing.

MR. MURA: It's both the creation of an addictive product and the marketing. And I would point the Court to paragraph 65 of the master complaint which discusses how defendants deliberately designed their platform to encourage compulsive use during the school day. And it cites a recent study by Common Sense Media which confirmed ubiquity and intensity of notifications during the school day.

THE COURT: But -- right, but what is different about what they were doing during the school day versus what they were just doing, period? How is the school day different from after school or evening or before school?

MR. MURA: Well, part of it was their profitability increases through the increased use of the phone, and that is a big block of time --

THE COURT: Yeah, vacation, though. I mean the summer months are different from the school year. Do you have

anything that's specific to the school day that -- right. Specific to the school day. Not generic, not a generic reference to just increased use but specific to the school day.

MR. MURA: I believe the paragraphs around 211, 213, and 214 to 228 are allegations that -- that discuss both knowledge of defendants' intentionality and the impact on the schools and the schools' reaction.

And there is a profit motive to having their products used all the time, and that includes during the school day. And it goes to the awareness of the ways in which -- the ways in which the use of the product by school -- I mean it is targeted towards school-age children.

THE COURT: Okay.

MR. MURA: And so that is the link.

THE COURT: Let's move on. It's been 30 minutes on this topic. We'll move on to public nuisance.

MR. MURA: Thank you, Your Honor.

THE COURT: And I now know who you are but just go ahead and --

MS. HARDIN: Ashley Hardin.

THE COURT: Okay. So that's fine. In general, plaintiffs go first. Then --

MS. HARDIN: Yes, ma'am.

THE COURT: Then defense. I don't care. It's very

nice of you to wait but you go first.

MR. WEINKOWITZ: Mike Weinkowitz on behalf of the school district plaintiffs.

THE COURT: Okay.

MS. HARDIN: Ashley Hardin on behalf of the YouTube defendants.

THE COURT: All right. Your motion, Ms. Hardin. You go first.

MS. HARDIN: Yes, Your Honor.

The Court ought to dismiss the school direct plaintiffs' public nuisance claims for three reasons. One, it is beyond the traditional ambit of the tort. Second, they have not adequately alleged interference with a public right. And third, they do not have standing to bring these claims because they haven't adequately alleged special injury.

I'll take them up one by one, Your Honor, unless Your Honor would like to start in a different location.

THE COURT: No, you can start there. I doubt I will stay silent for long. Go ahead.

MS. HARDIN: The plaintiffs -- these school districts plaintiffs, Your Honor, are trying to apply the law of public nuisance to a set of claims to which it was never intended to apply.

The law of public nuisance has never been broad enough nor has it ever been intended to be broad enough to address all

and any manner of social problems. Rather, the traditional law of public nuisance is limited in two important respects that bear on this case. One is that historically public nuisance limited to circumstances in which there is some nexus to land. That often --

THE COURT: I think you've got the stronger on this one. So Mr. Weinkowitz --

MR. WEINKOWITZ: Yes, Your Honor.

THE COURT: -- address the land issue.

MR. WEINKOWITZ: Yes. Defendants' categorical argument with -- that there is a requirement that there be an interference of land has just been expressly rejected by a number of courts.

THE COURT: But many courts have found that.

MR. WEINKOWITZ: Well, that doesn't -- many courts have found -- the courts that the defendants cite when they --

(Simultaneous colloquy.)

MR. WEINKOWITZ: -- talk about property, they talk about it being --

THE COURT: Rhode Island, Illinois, South Carolina?

MR. WEINKOWITZ: Those -- those courts did not say that it's only related to land. Those courts, when the -- they -- they specifically say that it has been traditionally related to land.

And in each one of those states, there are cases where

their public nuisance claims have been led -- have gone on where there is not property.

And if you look at the Restatement Comment H -- 821B, Comment H specifically says, unlike a private nuisance, a public nuisance does not necessarily involve interference with the use of enjoyment of land. And the cases in those states specifically note that, private nuisance, while it may be related to property, public nuisance does not always relate to property.

And there -- there's -- and the reporter note is replete with examples on that. Practicing medicine without a license, public profanity, vicious dog bites, snake handling at religious ceremonies, indecent exhibitions and -- and public fighting.

The adapt -- nuisance is an adaptable and -- and evolving cause of action that changes with scientific and factual circumstances. This was recognized by Justice Ginsburg in -- in the -- writing for the majority in the Supreme Court.

Opioid MDL looked at this very same issue the defendants made --

THE COURT: So it seems to me that -- that there are distinctions being made. Defendants concede, right, that California and Indiana do not require a connection, correct? To land.

MS. HARDIN: Not an express use of the defendants'

land, Your Honor. But many of the cases, as have been -- as have been recognized by California courts, have indeed --

THE COURT: Of course. That --

MS. HARDIN: -- dealt with land.

THE COURT: But that doesn't mean that they require it.

MS. HARDIN: We have stated in the brief, Your Honor, that Indiana and California do not require an express use or interference with land.

THE COURT: So Alaska, Colorado, Georgia, Kentucky, Louisiana, Maryland, North Carolina, Nevada, and Virginia haven't actually addressed the topic.

MR. WEINKOWITZ: That's correct. Those states have not addressed the topic.

THE COURT: So --

MR. WEINKOWITZ: I'm sorry.

THE COURT: Correct, they've not addressed it.

MS. HARDIN: The Supreme Court in those -- in those states, Your Honor -- I'm not sure I got the full list firmly in my brain from when you just rattled them off -- the Supreme Courts in those states have not necessarily addressed -- directly addressed it. But if you look at the history of the case law in all of those states, you will find that overwhelmingly all of the cases involve land.

And what every single case involves, Your Honor, including

every single case that Mr. Weinkowitz just cited from the Restatement involves a specific physical location, a place where one can go to encounter the nuisance-causing conduct and the interference. And every case he just listed involves that. The bullfighting, the vicious dog, the unlawful practice of medicine, the indecent exposure, they all involve a physical location, and we don't have that here.

THE COURT: But have you talked to Tim Sweeney? We're living in the metaverse. That is the next -- that is the next place where people engage in conduct and people will engage, in many people's view, in -- in the -- you know, that's where things will happen. You can go to concerts. You can do all sorts of things on platforms that were never -- were never envisioned, but that doesn't mean that things don't happen there. That doesn't mean that people don't have conversations there. That doesn't mean that it is not the modern public platform.

Think about Twitter. I mean, that is where people engage. People don't talk to each other anymore physically. They engage and do things in that kind of platform.

MS. HARDIN: That may very well be, Your Honor, but the law of public nuisance is not the doctrine to apply to address issues that may surround that. There may be causes of action that address those issues, but public nuisance is not one of them.

THE COURT: Like what?

MS. HARDIN: I'm sorry? Like what?

THE COURT: Like what?

MS. HARDIN: Well, I think it would obviously depend on the circumstances. But Your Honor has allowed --

THE COURT: First of all --

MS. HARDIN: -- personal injuries cases --

THE COURT: First of all --

MS. HARDIN: -- for example.

THE COURT: You need to slow down.

MS. HARDIN: Yes, ma'am.

THE COURT: Because my court reporter is going to be on the record until 4:30 this afternoon.

MS. HARDIN: Apologies.

THE COURT: So slow down.

Go ahead.

MS. HARDIN: What types of cause of action Your Honor has already allowed, personal injury causes of action on the basis of these very same issues. Defendants obviously disagreed with that, but both Your Honor and Judge Kuhl in the JCCP have allowed claims to go forward.

There -- if there are communication issues, of course there'd be potentially a host of causes of action. But in this case, getting back to the plaintiffs' allegations here, public nuisance doesn't apply to it.

And the second important limitation, if I may, Your Honor, in addition to the land argument is that the Restatement and the majority of state Supreme Court cases to have addressed the issue have held that public nuisance law does not apply to the manufacture and the distribution of a product put into the stream of commerce. It does not apply even when the conduct of the defendant is alleged to be wrongful.

So for example, the cases you cited, Your Honor, or that you mentioned, Rhode Island, Illinois, they -- the Oklahoma Supreme Court case in the *Hunter* case, Your Honor, which involved opioids -- the claims in those cases were all that the defendants had acted wrongfully, that they had overpromoted their product or promoted it in a way that was wrongful because the allegation was that the defendant knew that there were dangers associated with the product and that it was not safe.

Public nuisance has been held not to apply even in that circumstance. It's certainly been held to apply in a circumstance where the product is alleged to be defectively designed, as these plaintiffs allege.

And we've quoted you those cases, Your Honor. Of the seven Supreme Court cases to have considered the issue, five of the state Supreme Court cases have rejected the application of nuisance. And the third Restatement directly rejects the application of nuisance to these types of claims, Your Honor.

THE COURT: All right. A response.

MR. WEINKOWITZ: The categorical all-or-nothing approach that public nuisance cannot involve a product should be rejected. One, there's no bright line rule that public nuisance cannot involve a product. Two, it has to do with the conduct that's alleged, and here we have alleged --

THE COURT: There are a number of states that have seemed to have categorically said that product cases do not -- are not permitted.

MR. WEINKOWITZ: Well, in --

THE COURT: And so --

MR. WEINKOWITZ: Sorry, Your Honor.

THE COURT: -- again, citing to me -- there is no one rule for everybody. There is not. That's why these cases are tough. So with respect to those cases and those states that have said it doesn't apply, what's your response?

MR. WEINKOWITZ: With respect to those -- those particular cases and -- and probably --

THE COURT: States.

MR. WEINKOWITZ: -- states, you're probably thinking of the gun cases and the lead -- and the lead paint cases. And the difference between those cases and this case is fundamental.

In those cases, the defendants, when the product, the gun or the lead paint, left -- left their control, they had no

more control of it, they had no more control of the instrumentality. And that's what made the differences for the courts in those cases.

And here, the defendants control the instrumentality, their platforms, as we sit here today. They could pick up the -- the lawyers could pick up the phone, they could call someone at the company, and they could make a change to the product. They have control of the products.

So the distinction in the gun cases and the lead paint cases is control.

And why do you need control in a public nuisance case? Because if you don't have control, you cannot abate. If you don't have control, you cannot fix the public nuisance.

THE COURT: Okay. A response, on control.

MS. HARDIN: Control is not an element that we've moved on, Your Honor. And I think if you -- the cases speak for --

THE COURT: But do you agree that if you have control, that's indicative or that would be an element that would allow public nuisance?

MS. HARDIN: No, Your Honor. That's a separate issue from whether or not public nuisance has been -- has a limitation to either land or to the distribution and manufacture of products. And the cases treat them as separate and distinct issues.

THE COURT: In the cases that were cited, the lead and gun cases, was control discussed?

MS. HARDIN: Some of them do and some of them don't, Your Honor, because control is actually not an element in every state.

THE COURT: For the states where it is an element.

MS. HARDIN: I could not give you an exhaustive list. It is definitely an element in the Illinois *City of Chicago* case and in the Rhode Island case, Your Honor.

THE COURT: Okay.

MS. HARDIN: But that -- that's again a separate issue that need not trouble the Court here because it is separate from the --

THE COURT: Well, I have to --

MS. HARDIN: -- from the --

THE COURT: It's not an issue of trouble. It's an issue that the plaintiffs are arguing so I have to consider it, I can't ignore it.

MS. HARDIN: I understand, Your Honor, but we didn't move on that basis and so it's not an answer --

THE COURT: Whether or not you moved is not relevant if the plaintiffs' argument is that the distinction at issue is one of control. So you can choose to ignore it, and then I'll decide without your argument. Or you can address it.

MS. HARDIN: We are not ignoring it, Your Honor. Our

point is that it is not the distinction.

THE COURT: Okay.

MS. HARDIN: That is not the basis. If you read the Rhode Island Supreme Court, it tells you we don't apply product -- we don't apply public nuisance to products because rarely, if ever, will the manufacture or the distribution of a product impact a public right.

When we read *Illinois* --

THE COURT: Rarely if ever, which meant that there might be a rare instance where it does?

MS. HARDIN: Well, I think the plaintiff has said we have a categorical rule that a public nuisance claim can never involve a product. That is not the claim. It's not that a public nuisance may never involve, in some tangential fashion, a product. The issue is that public nuisance does not apply when the claim is simply one of negligence or -- or defective design because that is the law of products liability and negligence.

And the third Restatement says that the -- the application of public nuisance law to those types of claims is inapt and that it has -- it was a misuse of the second Restatement to the extent that cases who have allowed such an extension of public nuisance have done so in reliance on the Restatement.

So that -- and we'll get -- public right was my second issue, Your Honor. I'm happy to move to that, or if you still

have questions on this one.

THE COURT: You should because you'll run out of time otherwise.

MS. HARDIN: So public -- the plaintiffs have not adequately alleged a public nuisance claim, Your Honor, because they have not --

THE COURT: You're still speaking very fast. I'm sure you had a lot of coffee this morning.

MS. HARDIN: I'm afraid I can't even blame it on that, Your Honor. It's just a fault.

Public rights are shared indivisible resources to things like air, water, and rights-of-way. That's the definition under the Restatement. Your Honor can also think of it as public rights are really the ability of the public to be in public and to use public spaces and public resources.

Plaintiffs have not alleged any of that. They don't even address that definition, much less try to show that they meet it. Rather what they have said is that they have alleged a public right because they have identified an alleged public health crisis in the United States.

But the cases are clear, Your Honor, that the existence of a public health crisis is not the same thing as interference with a public right. But the Rhode Island, the Illinois, and the Oklahoma Supreme Courts started with the notion that in those cases, there had been some sort of interfere -- some

sort of public health crisis. In Rhode Island, it's the ingestion of lead paint and poisoning by children. In *Hunter*, the Oklahoma case, it's the opioid epidemic and addiction in the United States. And in Illinois, it's gun violence.

And they said that doesn't answer the question because we still ask what is the nature of the right that is allegedly being interfered with.

And the plaintiffs are quite clear, both throughout their complaint and in their opposition, that the interference -- and this is a quote from their brief on opposition page 34, Your Honor -- that the interference is with the mental health of school-age children thereby interfering with a public right to health.

And what they have alleged the interference is, Your Honor, is things like -- the injuries that result are things like body dysmorphia, anxiety, depression, self-harm, interruption with relationships, and difficulty in school. And those are quintessentially private rights, Your Honor. If there's been an interference at all, it's with the private rights of students.

THE COURT: So let me get a response from the school districts on that topics, the rights of the school districts being violated as opposed to the violations derivative from their students' rights.

MR. WEINKOWITZ: I understand, Your Honor. My answer

to that question is, is that, you know, the school districts -- the defendants' arguments are basically that the school districts are not exercising any rights at all, and as a result of that, there's no public nuisance claim because the entire claim is based on the individual students' rights.

But what I'd like to show you, Your Honor, is when I heard that argument and I read the brief, I thought, wow, that's an interesting argument and I'd like to see precisely what it is that the defendants are citing in support of that argument. Because that really focuses the narrow of public nuisance quite -- quite narrowly.

Could I get the ELMO?

THE COURT: Yes. We can turn that on.

(Demonstrative published.)

MR. WEINKOWITZ: Your Honor, so what I did was I went to the part of their brief where they made this argument, and I looked at footnote 39. And there they say see Restatement section 821B Comment g, and then they have a parenthetical.

And it says public nuisance is one that, and here is where the quote starts: Interference with those who come in contact with it in the exercise of a public right.

So I thought, wow, that's -- that's an interesting argument. And there's a period. And then I decided, well, I had to go back in and --

THE COURT: There's a period after the parenthetical,

not in the quote.

MR. WEINKOWITZ: Correct. So then I went in -- I went into the Restatement to see precisely what the quote was. And what -- what you see here is the paragraph that they quoted from, they picked -- they picked that phrase out, and it says, "It is, however, necessary" -- "It is not, however, necessary for the entire community to be affected by a public nuisance so long as the nuisance will interfere with those who come in contact with it." And this is the part they put in italics: "In the exercise of a public right." But there's an "or" there. And it says: "Or it otherwise affects the interests of the community at large."

And it is that phrase there where we find our public right. And maybe the ellipsis was missing, but it's that particular phrase where we find the public right, and the school districts don't actually have to be exercising the public right. The case simply needs to involve a public right. And --

THE COURT: Let me -- let me ask. I don't know if you cited these cases. There were a series of cases that came out of -- I think it was school district cases in San Antonio, Texas, where the court found that there was no fundamental right to an education. But did it talk about -- those cases, did those cases talk about the nature of the right to an education?

MR. WEINKOWITZ: I don't remember specifically what those cases talk about with regard to the right to public education. But what I will say about that is the right to public education is found in every constitution, state constitution.

And the right to education, the school districts have a duty to deal with the students that are before them, to deal with their mental health, to deal with -- to educate them.

THE COURT: Well, I mean they have all sorts of duties including with respect to those who are covered by the ADA and --

MR. WEINKOWITZ: That's correct.

THE COURT: -- and others. I just didn't know whether courts had -- circuit courts had opined on the nature of the right as opposed to --

MR. WEINKOWITZ: I -- I haven't -- and I will confess to you, Your Honor, there are no cases where the public right to education has been identified specifically as the right that was interfered with a nuisance claim. I can't purport to say that.

What I can purport to say is that there are two rights that are involved here, and it's public health and public education. And you get the public education right out of the constitutions of each state. I think that the Court can recognize the existence of that right and the right -- and the

Restatement doesn't specifically require their -- it gives a list of public rights --

THE COURT: Let me interrupt you.

MR. WEINKOWITZ: I'm sorry.

THE COURT: That's all right. I just want to get this one closed up here so we can take a break.

Is it true, have you checked whether, Ms. Hardin, all of the state constitutions at issue include the right to public health and/or public education?

MS. HARDIN: There is no constitutional right to health of which I am aware, Your Honor, in any of the states.

THE COURT: So he just said that -- that it stems from those state constitutions. So --

MS. HARDIN: I understood Mr. Weinkowitz to be speaking of the right to public educa- -- his alleged right to public education, not public health. But perhaps I misunderstood.

THE COURT: Okay. Well --

MS. HARDIN: There is no right to health.

THE COURT: Let's get clarity.

What were you talking about?

MR. WEINKOWITZ: I may have misspoken. If you look at Appendix E to our brief, as there is the state constitution of the 17 states at issue. Within that state constitution is the public right to education. The public right to health is

identified in the Restatement --

THE COURT: I see.

MR. WEINKOWITZ: -- and the case law. So we have the constitutions for the public right to education.

THE COURT: Okay. And you agree with that with respect to the education piece?

MS. HARDIN: I do not agree with -- I agree that there are in some states a constitutional duty imposed on states to provide a system of public education. That might, under some circumstances, Your Honor, give rise to a corresponding right of the citizenry to access public education. But that would not be a claim under public nuisance. Mr. Weinkowitz is quite right about the fact that there has never been a case in any of the 50 states in all of the law of public nuisance that has ever held that there is a right to public education that is redressable through public nuisance law.

Not even *Juul*, which is the plaintiffs' answer to most things in this case, held that there was a public right to education. Judge Orrick decided that case on the alleged interference with public health.

So we do not believe that -- that public education saves their public -- their public nuisance claims here, Your Honor, because we are still left with, at bottom, what is the interference with alleged private rights.

Because even as it relates to what it is they claim has been interfered with vis-a-vis education, it is individual students, it alleged interference with their academic performance, their ability to participate, their ability to pay attention.

It is -- you know, I think we cited in the brief, Your Honor, 80 times they mention the youth mental health crisis in their complaint. That is what these cases are alleged to be about.

And when we read the Restatement and the Supreme Court cases to have addressed this issue, this is not the kind of public right -- or not the kind of interference that satisfies the notion of public right because, again, it isn't coextensive.

THE COURT: Mr. Weinkowitz, the defendants argue that you lack authority to seek abatement of a public nuisance. What is your standing or statutory authority to seek an abatement?

MR. WEINKOWITZ: Your Honor, the causes of action are private rights of action. They are not public. They are not being brought by the school districts as public entities. And as a result of their being a private right of action, there is in fact, as long as we can meet the special injury requirement, which I can argue that we do, then we have the right -- we have the right to seek abatement.

And I can address the special injury argument, or I can go back to the private rights argument because I have some responses for that too.

THE COURT: You should be -- you can make your arguments. Just be judicious with your words.

MR. WEINKOWITZ: On private rights, the school -- first of all, the defendants have cherrypicked the allegations out of the complaint and ignored the allegations that indicate that it's more than just a private right.

We have alleged that the defendants' conduct not just harmed an individual student or one individual student but the entire public school system. It has impacted and infected how schools operate, how teachers teach, how coaches coach, how parent deal with their children.

Of course the school districts are going to describe the harms to individuals in the complaint because without describing those harms and the interference of those harms, the school districts would never be able to explain how the harms are impacting the schools. You can't have a public health crisis without having individuals. So to say that our entire complaint is about individual rights is just a mischaracterization.

THE COURT: Okay. Two minutes each to provide any further thoughts, and then we'll take our break.

MS. HARDIN: Yes, Your Honor.

All those injuries that Mr. Weinkowitz just noted are not interferences with any public rights. The fact that teachers' jobs might be harder or that they have had to expend more resources does not impact any indivisible resource that we have. We've covered the issues of no right to public education.

On special injury, Your Honor, they absolutely have to be injured in the exercise of their public rights. I'm not sure to what Mr. Weinkowitz is referring when he looks at the Restatement because Restatement Section 821C, which involves this direct issue, makes it quite clear that you can only be specially injured if you are injured exercising the right common to the general public that was the subject of the interference.

Certainly the school districts have not been injured in the exercise of their rights to public health or their rights to public education. Even if there were such rights, wouldn't make any sense to even speak in those terms. It is clear from the complaint and from the opposition that we are talking about the interference with students' rights.

So they don't meet that threshold showing for special injury. Their injuries are not different in kind and degree, Your Honor, because they are derivative. For reasons Mr. Pistilli has already explained, they are follow-on injuries. They are not distinct.

And if you look at the examples in the Restatement, Your Honor, of what it means to have special injury, every single one of them involves some interference with a -- with a public highway or a sidewalk that -- that impacts the -- the plaintiffs' ability to access his or her land.

And those cases essentially say that those plaintiffs could have also maintained a private nuisance because of the interference with their land. And I think even the plaintiffs agree that private nuisance has to involve use and interference with land.

You will not find in the Restatement, you will not find in a single case cited by the plaintiffs, other than the *Juul* case, that holds that there is special injury when one plaintiff simply has paid more money as a result of injury to a third party.

MR. WEINKOWITZ: Comment H to the Restatement. Pecuniary loss qualifies as special injury. This is page 4 on the Restatement. Pecuniary loss to the plaintiff resulting from a public nuisance is normally a different kind of harm from that suffered from the general public.

Then it goes on to give an example. A contract who loses the benefit of a particular contract or is put to additional expense in forming it because of the obstruction of a public highway preventing him from transporting materials --

THE COURT: Slow down.

MR. WEINKOWITZ: -- to the place performance can recover from public nuisance. The same holds true for lost profit.

The injuries to the school districts are not -- they are specific to the school districts. They are different from the injuries to the individual users' addiction, and they are wholly -- we have alleged that there has been injury to the school property, that the defendants have targeted the school -- not only the students but the individual school districts.

The master complaint alleges in detail internal documents in research by the defendants that, in the words of Meta, winning schools is the way to win with teams because an individual teen engagement is highly correlated.

TikTok and defendant -- and TikTok and Meta, just like big tobacco, just like big tobacco, joined up with third-party organizations called the National PTA and the Scholastic, and they went to back-to-school sponsor, back-to-school nights, to infiltrate the schools themselves inside the schools to get access to students, to get access to teachers, to get access to administrators. And as a result of that conduct, they contributed to, and just like big tobacco and just like *Juul*, to be honest with you, they infiltrated the schools and they created the public nuisance.

THE COURT: And on that, your two minutes is up,

Mr. Weinkowitz.

MR. WEINKOWITZ: Thank you, Your Honor.

THE COURT: Thank you both.

We will stand in recess for 20 minutes.

THE CLERK: Court is in recess.

(Recess taken at 10:01 A.M.; proceedings resumed at 10:21 A.M.)

THE CLERK: Please remain seated and come to order. Court is back in session.

THE COURT: Okay. We're back on the record.

The record will reflect that the parties are present.

Let's get the argument then on the last topic, negligence.

Ms. Yeates. Melissa Yeates and David Mattern.

Mr. Mattern, you may proceed.

MR. MATTERN: Good morning, Your Honor.

So I'm going to focus to today on duty and then the economic loss rule.

And to start with duty, there are three points that I want to talk about today.

The first is the third-party argument and how really all the school districts' allegations are based on harms to or from third parties that are barred by law.

The second point I want to discuss is foreseeability and why, as a legal question, the school districts' theory of liability is not foreseeable as a matter of law.

And finally I want to talk a little bit about public policy.

But to start with the issue about third parties, this -- the school districts' claims aren't that they use the defendants' services. Instead they claim that -- that they should be allowed to recover the money they spent providing harm to -- mental health services and the like to injuries they say students suffered.

And that's really clear if you take a look at their complaint. So I'm looking at paragraphs 1017 where they say defendants' actions constituted a failure to act in a way that was necessary for the protection or assistance of another in which the actor is under a duty to do so.

And really all the allegations in this negligence section are the same.

And why that's important is because in all the 19 states that are at issue, courts as a matter of law only recognize these types of claims if there's a special relationship with the school districts, say, that they don't allege, or if there was an example of misfeasance or the defendant doing something to increase the risk of harm. And there are no allegations that support that here.

I might respond to a couple of points that I expect my friend will make. And the first is that rather than really deal with the issue about a special relationship, the school

districts pivot to argue that because the platforms control their services, they have a supervisory relationship, and that's enough.

One, that's not the law. That's not what the cases say. But also the four cases that they cite on this don't even support the rule they're articulating. And this is from page 47 in their opposition.

So the cases they talk about are *Kesner*, *Cricket*, *J'Aire*, *McCain*. And these are all cases where there was more of a direct injury caused between the plaintiff and the defendants.

So *Kesner* is the asbestos case. Key to the court's rationale there was that, well, the employer has the ability to control what the employee does during the day. That's a kind of supervisory control. That's much different and doesn't exist for what the school districts allege against the platforms.

And even if you weren't sure about that, *Modisette* considered this exact argument when considering Apple, and Apple's FaceTime program, and said no, *Kesner* doesn't apply to design claims brought against Apple and platforms like Apple. So that really resolves that question.

The three other cases are even worse for the school districts. *Cricket* is a case where someone, a two-year-old, used a lighter that caught curtains in a house on fire and burned down the house and killed the occupants inside. The

estate sued. And there, there was a direct injury. So that's inapposite.

J.R. dealt -- deals with a special relationship between a contractor, not applicable here.

(Off-the-record discussion.)

MR. MATTERN: And so really that shows why the supervisory relationship part isn't enough.

The last piece of this is the misfeasance piece. And we think this is resolved by Your Honor's order in the personal injury cases which said that there were no allegations that the platforms engaged in the kinds of misfeasance that courts have recognized as an exception to this doctrine.

And so I'm happy to answer any questions about the third-party harm point, but we think that's a clear reason why we should win on the duty question.

THE COURT: A response.

MS. YEATES: Yes, Your Honor. Melissa Yeates of Kessler Topaz on behalf of the school district plaintiffs.

The focus of a negligence claim is on defendants' conduct. And the threshold question that defense counsel is speaking about is whether defendants owed plaintiffs a duty to act with due care, whether it's fair and equitable in this circumstance to require defendants to act in a way to avoid undue risk of harm to the school districts.

The school districts allege that defendants directly

targeted students and schools with the goal of never-ending use. The complaint is filled with allegations related to defendants' specific targeting of the schools and the specific harm that this caused the schools.

This is not a third-party no-duty-to-protect case, which is what defendants are attempting to shoehorn this case into. The no-duty-to-protect cases are cases like defendants cite in *Brown vs. Taekwondo*, *Regents of University of California*. Those are cases where plaintiffs merely allege that the defendant failed to protect them from a third party's conduct and primarily criminal conduct.

So the Taekwondo organization failed to protect a plaintiff from sexual abuse by her coach. The University failed to protect a plaintiff from a stabbing that happened in a chemistry classroom. That is not the type of situation we have here.

The no-duty-to-protect rule only applies when the complaint's allegations solely focus on the conduct of a third party. And that's the same situation for when a special relationship applies. A special relationship is only considered in cases like that where there are no allegations that the defendants' affirmative conduct created the risk of peril to the plaintiffs.

Here, those cases bear no resemblance to this case where the school districts allege that defendants' conduct, the

actions they took themselves, have harmed the school districts.

In creating the youth mental health crisis, in targeting schools, in targeting school-age children, we have numerous allegations about the fact that they wanted to win schools, that they wanted to make sure children were using their platforms compulsively, they were addicted to their platforms, they couldn't put them down at any time of day including during the school day.

Defendants even promoted their platforms as safe and beneficial to use in schools. They sent back-to-school kits. They updated features so that their platforms could be used on desktop computers during the school day. And they sent tips and tricks for use in the classroom.

All of this conduct, in targeting schools, attempting to addict children to these platforms, and monopolize their attention during the school day when the focus is supposed to be on education which the school districts here are obligated to provide, those are the allegations. Those are direct allegations of affirmative actions taken by defendants. And so those cases that defense counsel is talking about are wholly inapposite here.

THE COURT: So, Mr. Mattern, I can't point to the exact allegations, and I'm sure that there are some that, you know, only involve third-party conduct, but there clearly are

others that do not.

And in a social media order that I previously issued, I made that distinction about the fact that negligence claims where you have defendants' conduct that is -- or I should say it differently -- where there were no allegations about -- about the role of the defendants because you had -- you know, they're interactive, so to speak.

So the complaint, in order for you to succeed, I would have to ignore all of the allegations of defendants' conduct. How can I do that?

And what is the point of the motion given that there are allegations, so even to the extent that you're right that there is some third-party conduct, it's not solely third-party conduct that's at issue.

MR. MATTERN: So two responses to that, Your Honor.

So, first, you're absolutely right that there are examples such as paragraph 1023 subparagraph R that deal with claims of vandalism and theft that are clearly by third parties. And I think there maybe is even, you know, agreement in our understanding that those claims would be barred under the law.

For the second part of your question, though, I think how we view the case is that all of the school districts' allegations are based on harm that they say students and -- students really inflict on the school districts in a way that students cause distractions, that they weren't paying

attention in class --

THE COURT: But -- just that's not -- that's not accurate on the face of the complaint. I mean there are allegations about the specific conduct that the defendants are engaging in. And it may be right, it may be wrong. But you want me to ignore it and I can't. And so the question is, is there anything to be done short of ignoring that? I have to accept those allegations as true for purposes of this motion.

I understand in other parts of the motion maybe there's a way to narrow. I don't understand how to narrow with this part of the motion because on this particular issue, there are allegations that you want to ignore that I cannot.

MR. MATTERN: So I'm going to take a translator to convince you on foreseeability and public policy. But taking the question as it comes, my suggestion would be to, at the very least, dismiss the claims in paragraph 1023r and the allegations that relate to property damage by students.

And the gist of these allegations is that students watched the videos of viral pranks on various platforms and then replicated those pranks, which would be things like defacing the bathroom or like stealing bathroom doors, stuff like that.

THE COURT: All right. So response on 1023R.

MS. YEATES: Yes, Your Honor.

There are allegations related to property damage throughout the complaint, and there are a couple of different

reasons for that property damage.

One of the reasons is that because defendants acted in a way to create and market these platforms to teens in a way to make them use the platforms compulsively and addict them, that conduct has led teens to act out in schools and create property damage.

THE COURT: Isn't that a bit too, for lack of a better word given that the prior counsel couldn't give me any objective factors, too remote?

MS. YEATES: It is not too remote. Because this property damage is happening in a situation where a student is using their device in the classroom either to post or to look at videos and they're causing a disruption in the classroom and a teacher has to go in and try to take the device away or stop that conduct. And that can lead to disruptions, outbreaks. That can lead to property damage.

But the reason the student is acting like that is because they're addicted to the platform, which is exactly what defendants encouraged them to do. That's exactly why they made these design choices, why they made these marketing choices.

And so if you look at cases when third-party conduct is involved, just the fact that a third party is involved does not mean that you cannot have foreseeability of harm and you cannot have a duty.

And the *Hacala* case says that very expressly, that when a defendants' conduct puts a plaintiff in the foreseeable zone of risk and another party's conduct is also foreseeable, it's also within that foreseeable zone of risk, you have to look at the conduct as a whole, and that third party's conduct doesn't break the chain.

THE COURT: Well, we won't reargue it, but it seems as if you're focusing on content which gets you back to the 230 problem in addition to being too attenuated.

Let's move to the other sections.

Foreseeability, economic loss doctrine.

MR. MATTERN: And just briefly on the 230 question, Your Honor, which I'm not going to reargue, but we agree and we think that's the problem with all of the property allegations in addition to the argument that it's too attenuated as a matter of traditional negligence law.

Moving on to foreseeability, though, I think everyone generally agrees on the framework that foreseeability and public policy are what pretty much every state considers in deciding whether there's a duty. I think maybe there's a dispute at the margins about the weight that each state gives them, but I think everyone agrees that --

THE COURT: Do we agree? Do you agree on the framework?

MS. YEATES: I'm sorry. Could you repeat that?

MR. MATTERN: Yeah. So starting off with the framework, I think everyone agrees that pretty much every state looks at both foreseeability and public policy factors in deciding whether there's a duty.

MS. YEATES: I do not agree with that.

THE COURT: Okay. Well, let's start with legal duty.

MR. MATTERN: All right. So to start with that, and I think *Modisette* is really a great case here, it's California, it's a case where -- sorry. *Modisette* is great for the framework point. It's a case where a California court applied public policy even despite finding an injury foreseeable.

But on the question of foreseeability, so I think there are three problems with the school districts' allegations here. The first is that many of the ways that they claim the defendants targeted schools or targeted school-age individuals are barred by 230 and the First Amendment.

And just to take like a couple of examples.

THE COURT: Well, we aren't going to discuss that. So move on. I understand those arguments. We've had so much debate.

MR. MATTERN: Okay.

THE COURT: I don't need your argument on that matter.

MR. MATTERN: Okay. Understood, Your Honor.

And just for the record, I'm talking about paragraphs 220 to 240. But that's one point.

The second part is that the other piece to this is that really the injuries that the school districts claim are too attenuated and not foreseeable in terms of the doctrine.

And I want to draw a comparison to *Juul* because I think the differences in the allegations here and in *Juul* are really a great example of why the school districts' allegations are not foreseeable.

So the focus in *Juul* and in the opioid cases and in a lot of -- and the other cases that the school districts have cited have all been on some illegal conduct.

So the focus in *Juul* was a concern of avoiding creating a market for youth vaping which is not permitted. Likewise in the opioid cases, the concern in those cases is with creating a black market for drugs. That's in stark contrast to the platforms here which are lawfully used by students and many others for legitimate purposes.

And so I think if you look at each of those allegations, that's really a key distinction just as a legal matter about that element of illegality is missing, which is why the allegations here are different as a matter of law.

The next point to this is that accepting the school districts' allegations requires drawing a long string of inferences, many more than courts accept for foreseeability.

And, again, this is, as a legal question, it requires that the defendants design services in a way that is deficient, that's the first part. The second is that some students use them and that for some of those students it was harmful to their mental health or caused some other negative effect.

The fourth part of that is that there must be some injury that the students inflicted on the school districts, whether it's diverting resources, causing a distraction, or what the case may be.

And the next part of that is that the school district had to respond to that specific disruption or diversion or whatever, as the case may be.

And if you really parse the allegations of the complaint, it doesn't really draw that line through.

There's some generalized -- I'm sorry, Your Honor.

THE COURT: I'm not sure I agree with you. But go ahead.

MR. MATTERN: I think that there are generalized allegations about ways they -- they say that the platforms targeted school districts. We disagree with those, but I'm not going to argue it at this -- at the posture.

But I think what's missing is a connection that a particular school was targeted or that a particular school responded to what they say were disruptions caused by students using social media.

And, Your Honor, I think I'm much closer to the age of being in school than many of the folks that have appeared before you. I think -- I grew up with social media and schools have a long history of banning many things ranging from, you know, books to Game Boys to even calculators. It seems like this is sort of in line with that. But it's not evidence of actual disruption in response.

THE COURT: Do you have children?

MR. MATTERN: I do not.

THE COURT: Well, as a parent, I'm probably then closer to you -- closer than you to having school-aged kids in those environments. And it's -- it's ubiquitous. I mean they're everywhere.

And the challenges that they're facing -- I don't know that they have a claim -- but the challenges that they are facing are real, they are significant, and they all fall back and they are all tied back to these platforms.

MR. MATTERN: But, Your Honor, I think the -- the flip side of that, and this gets to the public policy point, if it's okay to move on to that, is really the important value that these platforms serve really as forums for communication and expression. And this is everything from --

THE COURT: I think it's really debatable at this point, right, how much is -- how much is valued and how much isn't valued.

MR. MATTERN: Well, I can certainly say that for many students like -- for many students it's a way to have a network to a community that they wouldn't have access to otherwise. Like, for example, I think the experience of a gay teen growing up in rural Ohio is probably a lot different than a teen growing up in Oakland. And social networks make it possible to have those kinds of communications or to build those networks that wouldn't exist otherwise.

THE COURT: There is a double-edged sword. It's a double-edged sword.

MR. MATTERN: But this is also this First Amendment, you know, free speech, these benefits, these are issues that courts have considered many times, even recognizing that it's a double-edged sword and the -- the social and societal arguments that go along with it.

This is something that's come up in the context of violent movies in the '80s and '90s, and that courts in *Olivia* and -- and *Zamora* considered and cited public policy in declining to impose a duty as a matter of law for fear of chilling speech.

THE COURT: All right. Let's get a response including with respect to *Modisette*, which is, for the court reporter, M-O-D-I-S-E-T-T-E, *vs. Apple*.

Go ahead.

MS. YEATES: Yes, Your Honor.

The type of foreseeability analysis that defense counsel

was describing is not the appropriate foreseeability analysis that applies at the duty stage. That's more akin to foreseeability at the proximate cause stage which is a factual issue and goes to the jury.

The foreseeability analysis when it comes to duty, which is a question for the Court, is a much broader analysis. It does not require that the precise harm in a given case be predictable. Instead it's enough that defendants should have foreseen that the general risk of injury would result from their conduct to these plaintiffs.

And when considering duty under that general analysis, you look to this class of plaintiffs. Is it foreseeable that this class of plaintiffs would be harmed by defendants' conduct? And we submit it was clearly foreseeable that when defendants were targeting students who spend six hours of their day in school, Facebook -- it's in our -- the allegations are in our complaint -- Facebook understood that that was six valuable hours. They wanted to get those back. They wanted to drive user engagement during that schoolday time.

And so when defendants are specifically targeting students in schools, and schools have an obligation, they're on the front lines, they are the providers of educational services during the day, disciplinary services, mental health and other school services, they have been targeted, they are clearly the class of entities that these defendants have a foreseeable

duty to. The defendants' conduct put them in the foreseeable zone of risk just like Judge Orrick found in *Juul*.

With regard to public policy, certain states do look to public policy in addition to foreseeability. Many of those states still say foreseeability is the number one, the principal determinant. But there are other public policy factors, and each of those weigh in favor of imposing a duty on defendants here.

Number one, the moral blame associated with defendants' conduct here is high. And in considering that, courts often look to whether defendants made money associated with their negligent conduct. Here, defendants certainly did, and lots of it. And that was the goal of the conduct, in fact.

There's a close connection between defendants' conduct in creating the youth mental health crisis and targeting schools and targeting students including during the school day, and the school districts' harm.

There is no social utility in defendants' conduct in targeting and addicting children, and any utility in the platforms themselves is outweighed by the nature of the risk and the foreseeability of the harm here.

The magnitude of the harm here is great. There is no significant burden on defendants in order for them to change their conduct. They could create less addictive platforms. They could stop targeting kids and schools. The community and

the public will benefit if a duty is imposed and the youth mental health crisis is curbed.

And there is strong public policy in favor of preventing future harm and in defendants bearing the risk associated with their negligent conduct as opposed to it being left as a burden on the school districts.

THE COURT: You mentioned that they wanted the six hours back. What are the allegations with respect to their specific conduct with respect to those specific hours? Or are there?

MS. YEATES: I have a list of the allegations about targeting schools, but if you're looking for that specific allegation, I think I did flag it here.

So if you look at the allegations at 65 and 214, that's where that type of analysis by defendants is talked about. There are another -- there are a number of other targeting allegations, 7, 16, 58, 65, 67, 211 through 228.

THE COURT: Okay. Thank you.

MS. YEATES: You're welcome.

Your Honor asked a question on *Modisette* so I'd like to talk about that if that's okay with you.

THE COURT: Okay.

MS. YEATES: Defendants point to this case as the sky is falling. You know, if -- if defendants have a duty to school districts here, suddenly the courthouse doors are open

and everyone can sue them for anything. But that's simply not the fact.

The *Modisette v. Apple* case is very precise in its analysis. The issue there was that Apple had designed the FaceTime feature and had not included a lockout technology on it. And then someone using the FaceTime feature was driving and injured people in a car crash.

The court there actually said that was foreseeable. This was an affirmative act case, and the court applied a foreseeability and a public policy analysis, which is the appropriate analysis here. And the court said even though it was foreseeable, there are a lot of public policy factors at issue here, and those weigh against imposing a duty.

And a couple of the things that the court looked at was that the California legislature had considered and chosen not to ban cell phone use while driving. Instead they elected to have hands-free options. They recognized the importance of being able to report traffic conditions, emergencies, and things of that sort.

And so the cell phone use was providing benefits to the community. And so they weighed that against the duty that plaintiffs would -- were requesting in that case, which, different from here, was an extremely broad duty.

Because Apple -- there were no allegations in the complaint that Apple had attempted to make FaceTime addictive

to drivers, had targeted drivers, had encouraged drivers to use FaceTime while driving, we have all of those allegations here, they didn't exist in the Apple case.

And the duty that was requested would run to all individuals who were injured by drivers using phones. The court said that's not beneficial for society. That's -- we need to have some line-drawing here.

And because of policy concerns, and the fact that importing that type of duty is akin to a general duty to the public, and it may preclude cell phone use which was already expressly permitted by the California courts, that that was against public policy and so they decided not to impose a duty there.

Here there are no such policy concerns. There is no law supporting compulsive social media use by teens or in schools. And the public policy concerns I just talked about, including the moral blame, the lack of social utility of defendants' conduct and the other public policy factors support imposing a duty.

THE COURT: Any comments with respect to the public policy considerations? And then we'll have very short argument on economic loss.

MR. MATTERN: Thank you, Your Honor.

So I want to start with *Modisette* because I think that's a really helpful frame for the public policy considerations.

And that's one, you know, while we think that -- I didn't hear a response about why the illegality nature of *Juul* versus the platforms here is enough to distinguish *Juul* on foreseeability.

Even if you don't agree with that, *Modisette* says, okay, we'll accept that the alleged harm is foreseeable, but as a matter of public policy we're going to decline to impose a duty. And this is a question that the court decided at the demurrer stage so it was a legal question.

And as I think my friend really explained, the basic public policy reason for doing so is that it was permissible for someone to use a cell phone. There wasn't a law banning it. Which again supports the illegality point I drew.

But second, looking at the opinion itself, *Modisette* pointed to decisions in the Supreme Court in, like, *Riley* and *Carpenter* that described how cell phones --

THE COURT: So I'll go back and read *Modisette*, but you're going to run out of time.

MR. MATTERN: Okay. My point, though, is that *Modisette* supports if there's a design claim targeted at a platform that someone can lawfully use, there's a strong public policy against imposing a duty there. And that's exactly what the school districts want to impose here. So that's one aspect of the public policy.

The second part to that is the First Amendment value of

these platforms as, you know, forums for expressive communication, for speech, for joining communities, all the reasons that we talked about a little bit ago.

And on a motion-to-dismiss stage, these are -- these First Amendment considerations are considerations that courts considered in cases like *Zamora*, in cases -- although it was a slightly more complicated posture as a legal question in *Olivia N.*, considered in *Sanders*, and considered in many of the video game cases.

So we think that that is a really strong countervailing consideration and something that also distinguishes the school districts' allegations in this context from those allegations in *Juul* and opioids.

And the third point is the -- is the issue of potentially limitless liability. The theory that the school districts espouse as to targeting is extraordinarily broad.

For example, I think I heard Mr. Weinkowitz cite efforts that platforms like TikTok made to go to the PTA to explain parental controls and other features of their platform, if really just having a meeting with the school by anyone is enough to consider targeting, that could really expand the kinds of claims that school districts could bring, including, you know, including anything -- anything that's theoretically used by children, whether it be like sugary cereals or, you know, notebooks or toys that are directed towards children,

and we think that really isn't the law. And the fact the plaintiffs do not cite any cases by school districts that had ever recognized these claims is telling.

So these are really the three points we consider on this point.

THE COURT: Do you want to say anything about the economic loss doctrine? Do you want to say anything?

MR. MATTERN: Yes, Your Honor.

So two parts to this. So the reason I wanted to flag the economic damages point -- sorry -- the property damages point before is that the only noneconomic damages, the only property damages are what we talked about in 1023 subparagraph R that deal, you know, viral pranks and, you know, destroying of school property.

If you put those aside, all the other damages are barred by the economic loss rule in the states that recognize it. I'll acknowledge that there are three states that don't, which are Colorado and the two Carolinas, but we think in the rest of the -- the other 16 states, all of plaintiffs --

THE COURT: What about Florida?

MR. MATTERN: So I think the Florida cases talk about economic loss as a consideration in the negligence point. So the analysis is a little different in the sense that it's baked into whether as a matter of Florida law there's a duty, but the outcome is the same which is that there's no recovery

in negligence for economic losses in Florida.

THE COURT: Do you agree with respect to Florida?

MS. YEATES: Do I agree that the economic loss rule applies in Florida? No. We cite the *Tiara Condominium* case that says the economic loss rule does not apply in Florida.

And the *In Re Short Squeeze* case that they put into their reply brief, that doesn't change that in any way. *In Re Short Squeeze* just talks about the difference between duty analysis and the economic loss rule and makes clear that the *Tiara Condominium* holding about economic loss, the economic loss rule not applying, does not also apply to a duty analysis. And so part of the duty analysis, when you look at foreseeability and public policy factors, you can look at whether those economic losses are foreseeable. But the rule does not apply outside of products liability claims.

THE COURT: You do concede that it applies in 12 jurisdictions.

Let's -- you don't have to necessarily count. My question really is, although I'd like to make sure that there are the 12 jurisdictions, if it applies in those jurisdictions and I find that the property damage claims are -- should be dismissed, property-damage-based claims, is there anything left?

MS. YEATES: We do not agree that it applies in the sense that it applies to this case in those jurisdictions. I

think what we are trying to distinguish in our brief is the states where there is no such doctrine, that's Colorado, North Carolina, South Carolina, then there's another set of states that only apply the doctrine between contracting parties or in products liability actions, which are not applicable here. That's Arizona, Florida, Georgia, Indiana, Maryland, and Rhode Island.

And the remaining states also do not apply the economic loss doctrine to this type of case when there is an independent duty to act with due care. And so those states look at where, what is the source of the duty of due care, and if it's not coming from a contract or a commercial transaction, then once the independent duty is established, then the economic loss doctrine does not apply to bar claims.

THE COURT: So are you saying that -- are you taking the position that there is no contract between -- well, perhaps not with the school districts.

Certainly there are lots of consumer plaintiffs' lawyers who believe that there is a contract between consumers themselves and the platforms.

MS. YEATES: There is no commercial transaction at issue here between the school districts and the defendants that would allow the economic loss rule to apply.

THE COURT: Okay. Do you want to address that point?

MR. MATTERN: Yes. Your Honor, we disagree that

those estimates limit the economic loss rule to the contractual context. I think for all of the -- all the cases that the school districts cited on this point, they just dealt with special circumstances where it was only discussing a contract.

And there are other cases from the states of those courts that apply the economic loss rule to traditional negligence claims that aren't based on a contractual allegations. And so I'd like to give like a couple of examples just from some of the states that I think I heard my friend say.

So, for example, in Georgia, the Supreme Court -- sorry -- the Eleventh Circuit explained just a couple of years ago that the economic loss rule has expanded to bar recovery in all negligence-based tort actions. And that's *Murray*, and the pin cite for that is 798 F. Appendix 486.

Likewise, I think I heard my friend say Alaska. And Alaska they cite to a decision from the Alaska Supreme Court from two years ago that deals with a question about a noneconomic damages cap. It's not even about the economic loss rule itself.

The opinion -- but that opinion, though, does not support the rule that the economic loss rule only applies to contractual claims. And other cases in Alaska have applied it to traditional tort claims.

And I think we briefed some of these other examples, but

just a couple of examples about how the contractual limitation we don't think really exists.

THE COURT: Okay. I'll look at the -- I'll have to look at the various state-by-state review.

Anything else on this?

MS. YEATES: May I respond to two items quickly that defense counsel raised.

With regard to illegality, nothing in any of the cases, *Ileto*, *Juul*, or otherwise, is based on the illegal nature of the product. Instead they look at defendants' actions. They looked at defendants' conduct and determined whether that conduct put plaintiffs in the foreseeable zone of risk. And we have alleged that defendants' conduct here certainly did put school districts in the foreseeable zone of risk.

With regard to public policy, I just also wanted to note that the federal government as well as state legislatures across the country are attempting to ban and put limits on these social media companies, and so public policy is certainly not weighing in their favor.

And with regard to the property damage issue, our allegations about property damage are content neutral. We allege that it is defendants' conduct in pushing these challenges to go viral, it's their business model to promote the challenges to increase user engagement. They don't care what the content is, they don't care what the students say.

The goal is to promote them, to make them go viral, to make them be using it all day during the school, and they reward and incentivize the students to use those.

And then also with regard to the property damage that stems from the mental health crisis itself and the behavioral issues associated with that, that's certainly content-neutral property damage that is not affected by section 230.

MR. MATTERN: May I briefly respond, Your Honor?

THE COURT: Yes.

MR. MATTERN: So I think I heard my friend make three points which I'll take in order.

THE COURT: Well, no, you've already dealt with some of them.

MR. MATTERN: Okay.

THE COURT: So what do you -- you've got one minute. What do you want to say?

MR. MATTERN: Okay. So I just wanted to direct this Court to page 46 of your order in the personal injury cases which deals with *Ileto* and why this illegality distinction is important.

I think that we've already addressed the second point. The argument that we made, of course, was the important First Amendment value that these platforms serve.

But the third point that I want to talk a little bit about is that the school districts' allegations can't be, as I think

my friend just put it, content neutral. They're allegations, and this is clear from the complaint, is that someone saw a viral prank or someone, for example, stole a faucet from the bathroom.

THE COURT: I've got all those points.

MR. MATTERN: Okay. Thank you, Your Honor.

Then we would just ask that you dismiss the negligence claim.

THE COURT: Okay. I've looked at my schedule with respect to the bellwether issues, and I can do a conference with you all on Tuesday, May 21st either first thing in the morning at 8:00 a.m. or preferably at the end of the day like 4:00 o'clock.

MS. YEATES: Thank you, Your Honor.

THE COURT: Thank you.

MS. PIERSON: Your Honor, Andrea Pierson, Faegre Drinker for the TikTok defendants.

Either or those times will work for the defendants, whatever is most convenient for the Court.

I think we would also ask, your -- your prior order, CMO 13, requires the defendants to disclose replacement picks on May 22nd which is Wednesday. We wondered if that deadline might be held in abeyance until after this conference, or if we could move that back a couple days, just so we have a chance to talk with you first and then a little bit of time to

reflect.

MR. WARREN: Your Honor, Previn Warren for the plaintiffs.

Both of those times would work. If the morning time is doable, that would be preferable from our end. But either way.

I don't quite understand the need for defendants to have more time, but if they -- we'd be amenable to kicking it by a day if that's necessary for whatever reason.

THE COURT: Okay. So let's go ahead and set it for 8:00 a.m. We can -- we'll have it on the webinar link. I only need on the platform individuals who are going to speak. So if you'll let Mr. Cuenco know that in advance.

I'll split the difference, selections due by noon on the 24th.

MS. PIERSON: Thank you, Your Honor.

MR. WARREN: Thank you, Your Honor.

THE COURT: Okay.

Do I have my folks who are meeting and conferring? Do I have a protocol?

MR. ANDREWS: Hello, Your Honor. Patrick Andrews for Lieff Cabraser for the plaintiffs.

We did meet and confer, and plaintiffs are happy to agree to a protocol that would require plaintiffs to provide notice to all defendants when seeking leave to amend -- or I mean,

sorry, when seeking to amend their short-form complaints. And that would provide for a meet-and-conferral process in which plaintiffs would hear out all of the defendants on any concerns that they may have about the request to amend.

What plaintiffs are not prepared to agree to is a requirement that would provide the unnamed defendant veto power on whether or not the plaintiffs may amend by consent when the other existing defendants consent to the amendment as provided for under Rule 15(a)(2) as that would disrupt the orderly process of filing without leave provided for in Rule 15.

And indeed in cases where YouTube is not sought to be add [sic], that's exactly what's happened. Plaintiff have -- plaintiffs have requested the consent of the existing defendants in those cases. And the -- when the existing defendants have provided consent, they have filed amended complaints, and added defendants, to date, have not raised any objections about that process. That is -- allows plaintiffs to proceed with amendment without any sort of logjam caused by unnamed defendants and unnecessary motion practice.

THE COURT: You should all be aware that I recently changed my standing order and my notes. While I am in this four-month trial, no one is allowed to -- and including this unless it's in my order -- no one is allowed to file any motion whatsoever without complying with that standing order.

All right. So what is your response with respect to Rule 15 and your demands?

MS. ZWANG-WEISSMAN: Your Honor, reading between the lines of what plaintiffs' counsel is saying, the only thing that plaintiffs' counsel agreed during meet-and-confer to do was to provide notice to the to-be-named defendants, but not to agree to any further protocol that has anything whatsoever to do with Rule 15, Rule 24, or otherwise.

So notice alone, Your Honor, without the opportunity to object in an organized and orderly way doesn't get us very far at all. And frankly it makes no sense in a case of this nature like an MDL.

There is a very simple, very efficient procedural remedy to this that requires less time, significantly less paperwork, including less motion practice, and would be fair to all parties, plaintiffs included, and that proposed process is laid out in the protocol that we attached as Exhibit B to the CMC statement for today's proceedings.

And that -- that proposed protocol has four very simple components. One, it proposes to give notice --

THE COURT: Hold on.

MS. ZWANG-WEISSMAN: -- to all.

THE COURT: I said hold on.

MS. ZWANG-WEISSMAN: Oh, I'm sorry, Your Honor. I didn't hear.

(Pause in the proceedings.)

THE COURT: Let me get it. It's not in my binder.

MS. ZWANG-WEISSMAN: I could provide Your Honor with a copy if it would be helpful.

THE COURT: Sure. If you have one.

(Pause in the proceedings.)

THE COURT: Any objection to paragraph 1?

MR. ANDREWS: Your Honor, we don't object --

THE COURT: Any -- just yes or no.

MR. ANDREWS: No.

THE COURT: Okay. Any objections to paragraph 2? Yes or no?

MR. ANDREWS: No, Your Honor.

THE COURT: So I take it with respect to paragraph 3, you object to 3B.

MR. ANDREWS: Correct, Your Honor.

THE COURT: Do you agree with the first sentence of paragraph 4?

MR. ANDREWS: I -- I don't believe we agree to the right to intervene, but we are amenable to them --

THE COURT: Do they have a right or not, is my question? Do they have a right or not under Rule 24?

MR. ANDREWS: It depends on the circumstances. In some cases, they have a right to intervene under Rule 24 --

THE COURT: Do they have a right here where you're

seeking to name them?

MR. ANDREWS: They would have -- we would agree to a right to intervene in those circumstances.

THE COURT: I'll issue an order on my own without further input from you all unless you want to give me other things to consider in terms of a protocol. There will be a protocol. It will be streamlined. And I will not be inundated by paper. Do you understand?

MR. ANDREWS: Understood, Your Honor.

THE COURT: Do you understand?

MS. ZWANG-WEISSMAN: Understood, Your Honor.

THE COURT: Anything else you want me to consider?

MS. ZWANG-WEISSMAN: No, Your Honor. Thank you for your time.

MR. ANDREWS: No, Your Honor. Thank you.

THE COURT: All right.

Are there any other issues that you all want to address today before we meet again on, I believe it's June 21st. That will be at 2:00 p.m. I will be in trial that day.

Anything else?

MR. WARREN: Not from the plaintiffs, Your Honor.

THE COURT: Mr. -- okay.

Anything from the defense?

MS. SIMONSEN: Nothing for the defendants, Your Honor. Thank you.

THE COURT: All right. So in that case, my court reporter will be delighted that she gets a break before our 1:00 o'clock.

Everybody have safe travels. And we'll be in touch in writing. Thank you.

THE CLERK: Court is adjourned in this matter.

(Proceedings were concluded at 11:13 A.M.)

--o0o--

CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter. I further certify that I am neither counsel for, related to, nor employed by any of the parties to the action in which this hearing was taken, and further that I am not financially nor otherwise interested in the outcome of the action.

Raynee H. Mercado, CSR, RMR, CRR, FCRR, CCRR

Wednesday, May 22, 2024